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Part 1

URUGUAY ROUND AGREEMENTS ACT

OCTOBER 3, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GIBBONS, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 5110 which on September 27, 1994, was referred jointly for a period ending not later than October 3, 1994, to the Committee on Ways and Means, the Committee on Agriculture, the Committee on Education and Labor, the Committee on Energy and Commerce, the Committee on Foreign Affairs, the Committee on Government Operations, the Committee on the Judiciary, and the Committee on Rules]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 5110) to approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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99–006

SUMMARY OF H.R. 5110, THE "URUGUAY ROUND AGREEMENTS ACT"

H.R. 5110, the "Uruguay Round Agreements Act," approves the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) and the Statement of Administrative Action (SAA) proposed to implement the Agreements, that were submitted to the Congress on September 27, 1994. The bill contains in the first six titles the provisions which are necessary or appropriate to implement the Uruguay Round Agreements in U.S. domestic law. The final two titles contain various provisions to offset the projected cost of the implementing legislation in order to comply with the pay-as-you-go requirements of the Budget Enforcement Act.

Section 1 of the bill sets forth the short title and table of contents. Section 2 contains definitions of various terms used in the Act.

TITLE I—APPROVAL OF, AND GENERAL PROVISIONS RELATING TO, THE URUGUAY ROUND AGREEMENTS

Title I contains general provisions (1) on approval and entry into force of the Uruguay Round Agreements, and the relationship of the Agreements to U.S. laws; (2) authorities to implement the results of the tariff negotiations; (3) procedures regarding implementation of dispute settlement proceedings affecting the United States and oversight of activities of the World Trade Organization (WTO); and (4) objectives regarding extended Uruguay Round negotiations and other related provisions.

Congress approves the Agreement Establishing the WTO and the trade agreements annexed thereto resulting from the Uruguay Round of GATT multilateral trade negotiations (the Uruguay Round Agreements) and the Statement of Administrative Action accompanying the implementing bill that were submitted by the President to the Congress on September 27, 1994. Subtitle A includes conditions for entry into force of the Agreements for the United States.

Subtitle A also sets forth the relationship of the Agreements to U.S. Federal and State laws and establishes extensive Federal-State consultation procedures regarding Agreement obligations and dispute settlement proceedings affecting State laws. Subtitle B authorizes the President to proclaim the tariff modifications necessary or appropriate to implement the U.S. Uruguay Round Schedule XX of tariff obligations.

Subtitle C sets forth consultation, notice, and reporting requirements with Congressional committee, private sector advisory committees, and the public throughout dispute settlement proceedings affecting the United States, and detailed procedures concerning implementation of dispute settlement findings. Subtitle C also requires an annual report to Congress on WTO activities and establishes procedures for Congressional review every five years of U.S. participation in the WTO.

Subtitle D sets forth U.S. objectives for extended negotiations on financial services, basic telecommunications, and civil aircraft; a requirement to seek the establishment of, and objectives for, a working party on internationally-recognized worker rights; and various other provisions related to implementation of agreement obligations.

TITLE II—ANTIDUMPING AND COUNTERVAILING DUTY PROVISIONS

Title II amends U.S. antidumping and countervailing duty laws to implement the Uruguay Round Antidumping and Subsidies/Countervailing Measures Agreements:

Antidumping provisions.—Title II amends U.S. antidumping law to:

establish a new fair comparison methodology that deducts the importer's profit from the U.S. price and provides for level of trade adjustments in the foreign market;

require a mandatory injury review every five years ("sunset" reviews);

require an examination of duty absorption in the context of sunset reviews, on request;

require in general that U.S. and foreign market prices be compared on an average-to-average basis in investigations, while providing a preference for average-to-individual comparisons in reviews;

establish a special adjustment for start-up production costs;

establish a special provision for captive production;

improve existing anticircumvention provisions; and

make other technical and conforming amendments to bring U.S. antidumping law into conformity with the Agreement.

Countervailing duty provisions.—Title II amends U.S. countervailing duty law to:

incorporate the Agreement's definitions of subsidy and specificity, which largely reflect existing U.S. law;

implement the Agreement's stricter disciplines on subsidies that, by their nature, are presumed to cause harm to other countries' industries;

implement the Agreement's three categories of non-actionable ("green-light") subsidies: for regional development, research and development, and environmental improvements;

provide for the automatic expiration after five years of the green-light provisions of U.S. countervailing duty law, unless extended by Congress; and

provide a specific opportunity for action under section 301 to address instances where green-light subsidies are found to cause "serious adverse effects."

TITLE III—ADDITIONAL IMPLEMENTATION OF AGREEMENTS

Title III implements in U.S. domestic law various provisions of the Uruguay Round Agreements relating to import safeguard measures; foreign trade barriers and unfair trade practices; unfair practices in import trade (section 337, Tariff Act of 1930); textiles and apparel trade; government procurement; and technical barriers to trade (product standards).

Safeguards provisions.—Subtitle A amends the safeguards provisions of U.S. law to: (1) provide more rapid and effective relief to a U.S. industry in "critical circumstances" cases; (2) revise the period of relief available to an initial period of 4 years, with a possible 4-year extension; (3) establish guidelines for imposition of quantitative restraints (QR's); (4) ban orderly marketing agreements; and (5) conform U.S. law to the procedural and due process requirements of the Agreement.

Foreign trade barriers and unfair trade practices.—Subtitle B amends "section 301", "special 301", and "Super 301" authorities under U.S. domestic law to enforce U.S. rights against foreign violations of trade agreements and other unfair foreign trade practices to (1) conform to time limits under WTO dispute settlement procedures; (2) clarify the scope of section 301 authority and its application to intellectual property rights protection and foreign anticompetitive practices; (3) require initiation of section 301 on foreign practices identified by September 30, 1995 as priorities for elimination to expand U.S. exports; and (4) require consultations with Congressional committees on action with respect to foreign trade barriers identified in annual National Trade Estimates report. Subtitle B also sets forth U.S. objectives on intellectual property and amplifies the bases for identifying priority foreign countries that lack adequate intellectual property protection.

Section 337 provisions.—Subtitle C amends section 337 of the Tariff Act of 1930, which provides remedies against imports that infringe valid and enforceable U.S. intellectual property rights, to: (1) preserve the overall efficacy of the section 337 remedy; (2) delete statutory timeframes for completion of U.S. International Trade Commission (ITC) investigations, but require that ITC set a target date for completing each investigation at the earliest practicable time; (3) minimize duplication of proceedings between the ITC and Federal district courts; and (4) limit the circumstances under which general exclusion orders may be granted.

Textiles and clothing.—Subtitle D sets forth requirements regarding the list of products to be integrated into the GATT during the transition phaseout period of the Multifiber Arrangement; extends the President's existing authority to regulate imports from countries not parties to a multilateral agreement on textile or agricultural products to cover imports from countries which are not parties to, or to whom the United States does not apply the WTO Agreement; establishes procedures regarding importation of products illegally transshipped; and requires the Secretary of the Treasury to issue regulations by July 1, 1995 establishing an "assembly" rule of origin for textile and apparel products as of July 1, 1996, with existing contracts entered into before July 20, 1994 "grandfathered" on goods imported before January 1, 1998.

Government procurement.—Subtitle E amends Title III of the Trade Agreements Act of 1979: (1) to conform to time limits and criteria for identifying, and imposing sanctions against, countries which maintain significant and persistent discrimination in their government procurement of U.S. goods or services; (2) to authorize the President to waive the prohibition on procurement of foreign products from non-signatory countries which apply transparent and competitive procurement procedures and maintain and enforce effective prohibitions on bribery and other corrupt practices in their procurement, and to waive the prohibition when supplies are unavailable; and (3) to authorize restrictions to be waived on expanded procurement coverage under the U.S.-Israel free trade agreement and under the Rural Electrification Act.

Product standards.—Subtitle F amends Title IV of the Trade Agreements Act of 1979 to clarify the ability of Federal agencies to issue standards-related measures and to determine the appropriate level of safety or protection of standards measures. An amendment to Title III of the Federal Seed Act deletes the requirement that imported seed be stained.

TITLE IV—AGRICULTURE-RELATED PROVISIONS

Titlle IV, Subtitle A (Agriculture), as well as section 111 in Title I, implement the Agreement on Agriculture.

Section 111 provides the general authority for (1) the conversion of U.S. quantitative import restrictions to tariff-rate quotas; and (2) the staged reduction of tariffs on imported agricultural products.

Part I (Market Access) of Subtitle A (Agriculture) makes changes to Federal law to (1) reflect the conversion of quantitative restrictions, authorized under section 22 of the Agricultural Adjustment

Act of 1933 and the Meat Import Act of 1979, to tariff-rate quotas; (2) authorize the President to take certain actions in administering tariff-rate quotes; and (3) establish a special safeguard for agricultural imports pursuant to Article 5 of the Agreement on Agriculture and provide the President with the authority to administer this safeguard with the advice of the Secretary of Agriculture.

Part II (Exports) makes changes to export-related provisions in agricultural trade law to ensure that U.S. export programs operate consistently with U.S. commitments on export subsidies under the Agreements.

Part III (Other Provisions) contains provisions relating to tobacco that (1) provide authority for the President to establish tariff-rate quotas on certain tobacco and tobacco-product imports; (2) amend provisions in the Omnibus Budget Reconciliation Act (OBRA) of 1993; and (3) provide authority for the President to reduce or eliminate tariffs on cigar binder and filler, wrapper, or oriental tobacco. Part III also mandates reports on (1) the extent to which Canada is complying with its obligations under the Uruguay Round Agreements with respect to dairy and poultry products, and with its related obligations under the North American Free Trade Agreements; and (2) the effects of the Uruguay Round Agreements on the Federal milk marketing order system.

Subtitle B (Sanitary and Phytosanitary Measures) amends Federal law to bring programs administered by the U.S. Department of Agriculture within the disciplines of the Agreement on the Application of Sanitary and Phytosanitary Measures. Subtitle C (Standards) provides for certain changes to Federal law to implement the Agreement of Technical Barriers to Trade.

TITLE V—INTELLECTUAL PROPERTY

Title V implements the Agreement on Trade-Related Aspects of Intellectual Property Rights. Title V consists of subtitles making changes in Federal law with respect to copyrights, trademarks, and patents.

Copyright provisions.—The copyright subtitle eliminates the sunset provision on rental rights in computer programs; protects against the unauthorized fixation in a sound recording or music video of a live performance or the communication to the public of the sounds of a live performance (the "antibootlegging" provision); and restores copyright protection to works already in the public domain in the United States but still under protection in a WTO member that is the source of the work.

Trademark provisions.—The trademark subtitle amends the definition of "abandonment" to extend from 2 to 3 years the time of non-use before there is prima facie evidence of abandonment; and prohibits registration of a misleading geographic indication identifying wines or spirits.

Patent provisions.—The patent subtitle provides NAFTA-consistent treatment of inventive activity occurring in WTO member countries for purposes of establishing the date of invention; amends the definition of infringing activity to include offers for sale and importation of a patented good; modifies the term of patent protection to 20 years from filing; and establishes a provisional patent application system and a right of internal priority for patent applications filed originally in the United States, as well as enabling a patent applicant to extend the term of patents that are delayed by interference proceedings, secrecy orders, and successful appeals to the Board of Patent Appeals or Interferences or a Federal court.

Other areas of U.S. intellectual property law are unaffected by the agreement.

TITLE VI—RELATED PROVISIONS

Title VI contains provisions extending expiring programs and amendments to certain customs laws related to the Uruguay Round Agreements, as well as conforming amendments to various laws to reflect the implementation of the Agreements.

Expiring programs.—Subtitle A extends the existing Generalized System of Preferences (GSP) program under Title V of the Trade Act of 1974, which expires on September 30, 1994, for a 10-month period, until July 31, 1995. The production incentive certificate (PIC) program for watch assemblers in the U.S. insular possessions, which expires on January 1, 1995, is extended for 12 years.

Customs provisions.—Subtitle B contains a technical correction to the Customs COBRA User Fee Account allowing Customs to reimburse its salaries and expenses appropriation for the enhanced Sunday and holiday customs inspector premium pay which was authorized in the Customs Inspector Pay Reform Act last year. Subtitle B also provides for an increase in the current customs merchandise processing fee rate for formal entries to .21 percent ad valorem and increases the cap on the range of such rate from .19 percent to .21 percent ad valorem.

TITLE VII—REVENUE PROVISIONS

Title VII contains a mix of timing and compliance provisions, outlay reduction, and for other provisions to assist in offsetting the projected cost of the implementing legislation.

The outlay reductions in Title VII derive from reforming the operation of the earned income tax credit and from reducing the interest rate that the Federal Government pays with respect to large corporate tax overpayments. In addition, the Treasury Department would be allowed to set investment yields for savings bonds according to market conditions, without the present-law constraint of a minimum investment yield of four percent.

Other provisions in Title VII are designed to improve taxpayer compliance and the timing of receipts to the Federal Government. For instance, taxpayers would be given the option to request voluntary withholding on certain Federal Government benefits and unemployment compensation. Certain income from foreign corporations would be subject to estimated tax throughout the year, like other types of income. Collections of certain excise taxes would be accelerated. A tax loophole would be closed by ensuring that partnerships cannot avoid gain to their partners by distributing marketable securities instead of cash.

Title VII also contains pension reforms that are designed to improve funding in current underfunded defined benefit plans guaranteed by the Pension Benefit Guaranty Corporation (PBGC) and to improve participant protections.

TITLE VIII—PIONEER PREFERENCES

Title VIII amends the Communications Act to require that the three companies that have been awarded "Pioneer Preferences" by the Federal Communications Commission pay the Government for their licenses to provide personal communications services. The provision requires these companies to pay an amount equal to 85 percent of the average amount that is paid for comparable licenses in the 20 largest markets in the United States, calculated on a per capita basis. The provision also codifies the Commission's decision to designate these companies as "pioneers," and establishes a 5-year schedule for the payments.

BACKGROUND AND PURPOSE

The Uruguay Round Agreements submitted to the Congress by the President on September 27, 1994, for approval are the culmination of negotiations among 125 nations launched eight years ago in Punta del Este, Uruguay in September 1986, under the auspices of the GATT. These negotiations were concluded on April 15, 1994, in Marrakesh, Morocco with a total of 111 countries, including the United States, signing the Final Act and thereby undertaking the commitment to bring the results before their respective legislatures for ratification.

Sections 1101–1103 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100–418, enacted August 23, 1988) set forth U.S. negotiating objectives and the authority and implementing procedures necessary for U.S. participation. The authority for the President to enter into trade agreements under "fast track" Congressional implementing procedures expired May 31, 1991, subject to extension for two years if requested by the President and not disapproved by the Congress.

On March 1, 1991, President Bush requested extension of the fast track trade agreement authority for two years to enable completion of the Uruguay Round negotiations as well as the proposed North American Free Trade Agreement (NAFTA). The authority was automatically extended for the additional two-year period for trade agreements entered into before June 1, 1993, when neither House of Congress passed by May 31, 1991, a resolution disapproving extension.

On April 9, 1993, President Clinton announced his decision to seek legislation renewing fast track authority for an additional 10-month period only for purposes of completing the Uruguay Round negotiations. On April 27, the Trade Representative transmitted draft bills on behalf of the President to the Speaker of the House and the President of the Senate to extend the authority for the President to enter into trade agreements resulting from the Uruguay Round before June 1, 1993, subject to providing the Congress 120-day advance notice (by December 15, 1993), of his intent to enter into such agreements. H.R. 1876 was reported to the House by the Committee on Ways and Means on June 14, 1993, passed the House on June 22, the Senate on June 30, and was signed into law on July 2, 1993 (Public Law 103–49).

On December 15, 1993, the Uruguay Round negotiations concluded at GATT headquarters in Geneva, Switzerland and President Clinton notified the Congress on that date of his intent to enter into the agreements on April 15, 1994 (House Document 103–195). The United States signed the agreements at Marrakesh on April 15.

As required by Public Law 103–49, the private sector advisory committees established under section 135 of the Trade Act of 1974 submitted their reports assessing the agreements to the President, the USTR, and the Congress on January 14, 1994.

Informal staff-level discussions began in early January 1994, between the Administration and committees of jurisdiction, and with House and Senate legislative counsels on those changes in U.S. statutes or additional authorities necessary or appropriate to include in the implementing legislation. To initiate these discussions, the Administration supplied a listing to the committees of U.S. statutes requiring modification to comply with Uruguay Round agreement obligations. House and Senate legislative counsels drafted the text of the proposed draft implementing bill, initially from draft texts supplied by the Administration.

In a letter to the Chairman of the Committee dated May 3, 1994, President Clinton stated his intention to submit implementing legislation for the Uruguay Round agreements in 1994, and his commitment to seek bipartisan support for its passage so that the agreements could enter into force on January 1, 1995.

On September 23, 1994, the Speaker of the House and the Majority Leader of the Senate transmitted the recommendations of the House and Senate in draft legislative form to the U.S. Trade Representative, Michael Kantor, as developed through informal consultations between House and Senate committees of jurisdiction and the Administration. The legislation noted the few items on which informal consensus could not be reached among the committees and for which the Administration would have to make the final judgment with respect to inclusion in the final bill.

On September 27, 1994, President Clinton sent a letter of transmittal to the House and to the Senate covering: (1) transmittal of the final texts of the Uruguay Round agreements, including the Agreement Establishing the World Trade Organization, as signed on April 15; (2) the draft implementing bill and Statement of Administrative Action; and (3) supporting documents, as required by section 1103 of the 1988 Act for Congressional approval (House Document 103–316).

As provided under section 151 of the Trade Act of 1974, the implementing legislation was introduced in the House on September 27 as H.R. 5110 by Majority Leader Gephardt, for himself and Minority leader Michel by request, and jointly referred to eight committees of jurisdiction for a period ending October 3, 1994: Ways and Means, Agriculture, Education and Labor, Energy and Commerce, Foreign Affairs, Government Operations, Judiciary, and Rules.

Summary of the Agreements

The results of the Uruguay Round consist of the Agreement Establishing the World Trade Organization (WTO) and 16 multilateral and two plurilateral agreements annexed thereto which must be approved by the Congress, plus various related understandings, decisions, and declarations, as well as schedules of specific tariff, nontariff, and services commitments of more than 100 participating countries. Much of what was negotiated in the Uruguay Round will require no change in existing U.S. law or practice for implementation.

1. AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (WTO AGREEMENT)

Establishes an international organization which encompasses the existing GATT institutional structure and extends it to the new Uruguay Round discriplines on services, intellectual property, and investment.

Limits WTO membership to GATT members which agree to adhere to all of the Uruguay Round multilateral agreements and submit schedules of market access commitments on industrial and agricultural goods and services.

Retains GATT general decision-making by consensus and provides specific institutional rules for amendments, waivers, and interpretations of obligations, including non-binding application of substantive amendments to non-accepting members.

2. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (GATT 1994)

Incorporates the provisions of the existing GATT 1947 plus texts and understandings reached in the Uruguay Round with respect to certain GATT Articles.

Marrakesh Protocol to the GATT 1994 contains the general rules for implementation of the schedules of specific commitments by each country which are annexed to the Protocol on MFN and preferential tariffs, nontariff barriers, and domestic support and export subsidies for agricultural goods.

3. AGREEMENT ON AGRICULTURE

Establishes rules and reduction commitments over six years for developed countries and ten years for developing countries on export subsidies, domestic subsidies, and market access.

Export subsidies must be reduced by 36 percent (budget outlays) and 21 percent (volume) from the 1986–1990 base period for specific products or categories.

Trade distorting domestic subsidies must be bound and reduced by 20 percent from the 1986–1990 base period.

Nontariff import barriers are subject to comprehensive tariffication and minimum or current access commitments; all agricultural tariffs are bound and reduced.

4. AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Establishes rules and disciplines for the development and application of sanitary and phytosanitary (S&P) measures.

Acknowledges the sovereign right of each country to establish laws, regulations, and requirements necessary to protect life and health, but specifies rules to prevent use of such measures as disguised barriers to trade.

Requires the use of international standards as a basis for S&P measures generally, but governments may adopt more stringent appropriate measures if based on available scientific evidence and risk assessment.

5. AGREEMENT ON TEXTILES AND CLOTHING

Contains a schedule for phasing out import quotas established pursuant to the Multifiber Arrangement (MFA) over a ten-year transition period.

Provides for product integration and an increase in current quota growth rates in three stages. A transitional safeguard mechanism allows quotas against damaging import surges.

Requires all countries to improve market access for textiles and clothing.

6. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Ensures each country the right to establish and maintain standards and technical regulations at an appropriate level of protection for human, animal and plant life and health and the environment and to prevent deceptive practices, while not creating unnecessary obstacles to trade.

Contains provisions regarding conformity assessment procedures, including the acceptance of results and recognition of foreign-based laboratories or firms by another country.

7. AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMS)

Prohibits any country from applying TRIMs that are GATT inconsistent and contains an illustrative list of prohibited measures, including local content and trade balancing requirements. TRIMS may be imposed on new firms during the transition periods to avoid competitive disadvantage for existing investments subject to TRIMs.

8. AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GATT 1994 (RELATING TO ANTIDUMPING)

Establishes clearer and substantially more detailed rules governing the measurement of the margin of dumping, conduct of the antidumping investigation (including standing), assessment and collection of duties, and other aspects of antidumping practice. Key areas covered include standing requirements, average to average comparison requirements in investigations, treatment of sales below cost, calculation of profits in constructed value situations, and new shipper rates.

Preserves largely unchanged existing injury test.

Includes a requirement that the U.S. International Trade Commission conduct a review every five years as to whether injury would be likely to continue or recur if the antidumping order was lifted, and for the order to be terminated unless the Commission reaches an affirmative finding.

Includes significant due process and transparency requirements to protect exporters subject to antidumping investigations.

9. AGREEMENT ON IMPLEMENTATION OF ARTICLE VII OF THE GATT 1994 (RELATING TO CUSTOMS VALUATION)

Amends the existing GATT Valuation Agreement in three procedural respects, including further clarification of the rights and obligations of both importing and exporting countries in cases of suspected fraud.

10. AGREEMENT ON PRESHIPMENT INSPECTION

Establishes rules and procedures for the activities of preshipment inspection companies.

11. AGREEMENT ON RULES OF ORIGIN

Establishes a three-year work program to develop detailed definitions for harmonizing rules of origin among countries, the results of which will be annexed to the Agreement.

12. AGREEMENT ON IMPORT LICENSING PROCEDURES

Defines more precisely automatic and non-automatic licensing, and requires various procedures and time limits for their application.

13. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Creates three categories of subsides, makes certain changes in countervailing duty rules, and imposes multilateral subsidy disciplines on developing countries with certain derogations.

Prohibits export subsidies and subsidies contingent upon the use of local content; establishes a presumption of "serious prejudice" to another country's trade interests and an obligation to withdraw the subsidy or remove its adverse effects if the subsidy exceeds five percent or is provided for debt forgiveness or to cover firm or industry operating losses.

Makes three types of certain government assistance non-actionable, subject to specific limiting criteria: for industrial research and pre-competitive development activity, for regional development, and to adapt existing plant and equipment to new environmental requirements.

Other subsidies are permissible but actionable multilaterally and countervailable unilaterally if they cause adverse trade effects.

14. AGREEMENT ON SAFEGUARDS

Establishes comparable rules, criteria, and procedures for countries to take safeguard actions, including a maximum duration and phase-out of actions, requirements for a transparent public process for making injury determinations, clearly defined injury criteria, and the right to take provisional safeguard measures in critical circumstances and on perishable products.

Suspends the automatic right for adversely affected countries to retaliation during the first three years of a safeguard measure.

Requires phaseout of voluntary restraint arrangements.

15. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Establishes a framework of rules for trade and investment in services sectors, including most-favored-nation (MFN) and national treatment, market access, transparency, and the free flow of payments and transfers.

Contains schedules of binding commitments by countries to market access and national treatment in specific services sectors and horizontal measures; permits countries to take one-time exemptions from MFN treatment.

Contains sectoral annexes dealing with issues affecting financial services, movement of personnel, enhanced financial services, movement of personnel, enhanced telecommunications, and aviation services.

Provides for future negotiations for progressive services trade liberalization and on framework provisions, as well as on maritime, financial, audiovisual, and basic telecommunication services.

16. AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Establishes improved standards for protection of intellectual property rights and enforcement of those standards both internally and at the border, covering copyrights, patents, trademarks, industrial designs, trade secrets, integrated circuits, and geographical indications.

17. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Creates new procedures for settlement of disputes arising under any of the Uruguay Round agreements and provides time limits for each step in the process.

Creates a more automatic process, including a right to a panel, adoption of panel reports unless there is consensus to reject the report, appellate legal review on request, time limits for country conformity with panel rulings and recommendations and authorization of retaliation if such limits are not met.

18. AGREEMENT ON GOVERNMENT PROCUREMENT

Replaces the existing GATT Government Procurement Agreement, expanding the coverage to include services and construction as well as goods, and purchasing by some subcentral governments (including 37 States) and government-owned utilities as well as by Federal entities.

Improves procedures and enforcement, including a prohibition on the use of offsets as a condition for contract award and requirements for government entities to enable suppliers and service providers to challenge alleged breaches of Agreement bid and tender procedures.

19. ARRANGEMENT REGARDING BOVINE MEAT

Establishes the International Meat Council of signatory countries to consult regularly on all matters affecting trade in bovine meat and live animals, to share and evaluate information, and to identify possible solutions to evidence of serious imbalance in the international meat market.

BENEFITS OF THE URUGUAY ROUND TRADE AGREEMENTS

OVERALL BENEFITS

The Uruguay Round Agreements are the broadest, most comprehensive trade agreements in history and were negotiated by 125 countries. They are vital to our national interest and to economic growth, job creation, and an improved standard of living for all Americans. These agreements, by lowering tariff and other barriers to international trade and investment, will lead to increased levels of world and U.S. output, trade, real income, savings, investment, and consumption.

When fully implemented, these agreements are expected to increase U.S. GNP by $100–$200 billion per year. They are also expected to create hundreds of thousands of new, permanent well-paying American jobs (over and above the normal growth in employment in the economy). By cutting global tariffs by more than one-third, they will provide for a reduction in worldwide tariffs of $744 billion over the next ten years, the largest global tax cut in history. The reduction in U.S. tariffs alone is equivalent to a $36 billion tax cut for Americans over these ten years.

The agreements will also reduce or eliminate numerous non-tariff measures, such as quotes, restrictive licensing systems, and discriminatory product standards. The reductions in tariffs and non-tariff barriers will mean lower prices for imported goods and better access abroad for U.S. exports.

The agreement in agriculture will reduce global trade-distorting subsidies and other barriers to U.S. agricultural exports. This could lead to an increase in U.S. agricultural exports by as much as $8.5 billion per year when the agreement is fully implemented by 2005. The agreement on services will increase U.S. services exports in areas such as construction, professional services, enhanced telecommunications, and insurance. The agreement on intellectual property will dramatically improve protection and enforcement of U.S. intellectual property rights abroad.

EFFECTS ON INVESTMENT

The agreements also will provide longer-term benefits from channeling the enlarged pool of world savings into investment in new capital goods that will expand production possibilities in the United States and around the world. In this regard, investment in the United States will increase to equip expanding U.S. industries with new plant and equipment. Foreign direct investment in the United States will be attracted by new investment opportunities and higher expected returns in expanding U.S. industries. U.S. direct investment abroad should expand as well, leading to greater U.S. export opportunities because foreign affiliates of U.S. firms will buy many inputs from the United States.

EFFECTS ON LABOR

Expanded trade resulting from the agreements will produce more higher paying jobs for U.S. workers. One study, by DRI/McGraw-

Hill estimated that Uruguay Round trade liberalization would boost aggregate U.S. employment by 1 percent (or 1.4 million jobs) above base-line levels at the end of the ten-year phase-in period of the agreements. This figure rises to 2 million jobs (a 1.5 percent increase over baseline) after an additional three years. While other studies do not predict as high a net increase in jobs as this study, there is a general consensus that the agreements will create at least between 300,000 and 700,000 new permanent jobs over this ten-year period. At the same time, it is not expected that the agreements will lead to significant dislocation of U.S. workers because U.S. tariff reductions will be phased in gradually over a 5-year period for most products and up to 10 years for the most sensitive products, in order to give firms and workers sufficient time to adjust. In addition, safeguard provisions will allow temporary imposition of higher duties if import surges cause serious injury to firms or workers.

INCREASED MARKET ACCESS FOR U.S. EXPORTS IN DEVELOPING COUNTRIES

One of the major benefits of the agreements for the United States is to increase market access for U.S. exports in developing countries such as India, Brazil, Korea, Thailand, Indonesia, and Malaysia. Opening up new markets in the developing world is essential to creating jobs and economic growth at home. In addition, by requiring that both developed and developing countries alike adhere to the new rules set forth, the agreements ensure that there will be no "free riders," as has been the case in the past.

ITC STUDY ON POTENTIAL IMPACT ON THE U.S. ECONOMY

On March 22, 1994, the Chairmen of the Committee on Ways and Means and the Senate Committee on Finance requested that the U.S. International Trade Commission (ITC) undertake a study under section 332 of the Tariff Act of 1930 which would: (a) review economy-wide studies that has been done of the likely effects of the Uruguay Round Agreements; and (b) analyze independently the impact of both tariff and nontariff provisions of these agreements on important agricultural, industrial, and service sectors of the U.S. economy. The ITC completed the study in June 1994 and submitted it to the committees as a printed document (ITC No. 332–323).

In its review of existing economy-wide studies, the ITC found that most of these studies predict that the U.S. gross domestic product (GDP) and national income will increase. Although the static estimates of gains in GDP are expected to be small, long-run dynamic growth effects of trade liberalization may be expected to be two to three times the static estimates. The studies also predict a minor increase in aggregate employment in the United States. However, these estimates are lower than they might be if they had also taken into account reductions in nontariff barriers such as trade-related performance requirements or import licensing, or improvement in intellectual property protection, items which were not included because they are not easily and reliably quantified.

In its assessment of the likely impact of the agreements on various sectors of the U.S. economy, the ITC found that for most sectors the net trade effects are likely to be positive, although small.

For some sectors, the net trade effects will be negligible and for a few, there will be negative trade effects. These assessments were based on the quantitative results of static econometric models, which were supplemented by qualitative evaluations derived from interviews with experts in trade, industry, and government, and from written submissions from interested parties. The ITC also noted that the agreements governing nontariff barriers are likely to have a significant positive impact on a number of sectors which will serve to augment the trade gains arising from tariff reductions. Sectors which will benefit the most from the Uruguay Round are pharmaceuticals, fruits and vegetables, and grains; sectors that can expect some negative effects include textiles and apparel. The services sector will experience net trade gains, which will increase the current trade surplus in this sector.

LEGISLATIVE AUTHORITY

The Uruguay Round agreements were negotiated and entered into under the trade agreement authorities of section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100–418). Section 1102 authorizes the President to enter into multilateral or bilateral trade agreements, before June 1, 1993, (extended by Public Law 103–49 until April 15, 1994, only for the GATT Uruguay Round of Multilateral Trade Negotiations) to reduce or eliminate tariff or nontariff barriers and other trade-distorting measures. The authorities provide the means to achieve U.S. negotiating objectives set forth under section 1101 of the 1988 Act.

The President is authorized under section 1102(a) to implement trade agreement modifications on U.S. tariffs by proclamation within specified limits. Agreements regarding nontariff barriers entered into under section 1102(b) are subject to consultation requirements with Congressional committees of jurisdiction under sections 1102 and 1103 of the 1988 Act and Congressional approval of implementing legislation under special "fast track" procedural rules of the House and Senate under section 151 of the Trade Act of 1974.

The Uruguay Round agreements cannot enter into force for the United States and become binding as a matter of domestic law unless the President meets the requirements specified under sections 1102 and 1103 for consultation with the Congress and implementing legislation approving the agreement and any changes in U.S. statutes are enacted into law:

(1) Before entering into an agreement, the President must consult with the appropriate committees of jurisdiction over subject matters affected by the agreement, especially regarding issues of implementation.

(2) The President must give the Congress at least 120 days advance notice of his intention to enter into the agreement.

(3) After entering into the agreement, the President must submit a copy of the agreement to Congress, together with a draft implementing bill, a statement of any administrative actions proposed to implement the agreement, an explanation of how the bill and statement change or affect existing law, and a statement of reasons the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate.

(4) The implementing bill is introduced in both Houses of Congress on the day it is submitted by the President and referred to the committee or committees of jurisdiction. Fast track rules give the committees up to 45 legislative days in which to report the bill; a committee is discharged automatically from further consideration after that period. (The Speaker of the House limited referral of H.R. 5110, introduced on September 27, to October 3, 1994.)

(5) Each House votes on the bill with 15 legislative days after committee consideration. A motion in the House to proceed to consideration of the implementing bill is highly privileged and not debatable. Amendments or motions to recommit are not in order, and debate is limited to not more than 20 hours.

The purpose of the approval process is to preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which generally involve substantial changes in domestic laws. The consultation and notification requirements provide the opportunity for congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or administrative practice to be fully taken into account and any implementing problems resolved prior to entry into the agreement and introduction of the implementing bill. At the same time, the process ensures the Executive branch and foreign countries of expeditious action on the final agreement and implementing bill without amendments. This process was used successfully in approving the GATT Tokyo Round multilateral trade agreements in the Trade Agreements Act of 1979, the United States-Israel Free Trade Area Implementation Act of 1985, the United States-Canada Free Trade Agreements Implementation Act of 1988, and the NAFTA Implementation Act.

COMMITTEE ACTION

Since enactment of the Omnibus Trade and Competitiveness Act of 1988, which set forth the basic U.S. authority and negotiating objectives for the Uruguay Round agreements, the Committee on Ways and Means and Subcommittee on Trade have held several public hearings and conducted other oversight activities throughout the course of the Uruguay Round negotiations.

The Subcommittee held hearings on the negotiations on April 11, 1989 (Serial No. 101–7). In conjunction with President Bush's request in March 1991, to extend the fast track authority for an additional two years until June 1993, for the Uruguay Round and NAFTA negotiations, the full Committee held two days of hearings, on March 12 and April 11, 1991 (Serial No. 102–16). The Subcommittee held hearings on January 23, 1992 (Serial No. 102–18) on the draft final text of the results of the negotiations issued by GATT Director General Dunkel in December 1991. On April 27, 1993, the Subcommittee held hearings (Serial No. 103–11) on President Clinton's request for legislation to extend the fast track authority until April 15, 1994, in order to complete the Uruguay Round negotiations. The Subcommittee held two days of hearings, on the negotiations on November 4 and 5, 1993 (Serial No. 103–47). Following the 120-day advance notice to Congress on December 15, 1993, of the President's intent to enter into the agreements, the full Committee held a hearing on January 26, 1994, followed by four days of comprehensive Subcommittee hearings on February 1, 2, 8, and 22 to review the final results of the Uruguay Round negotiations (Serial No. 103–73). Finally, the full Committee held a hearing on June 10, 1994 on the World Trade Organization and its implications for U.S. sovereignty.

Extensive oral testimony was received during these hearings as well as written submissions for the record from Administration officials who negotiated the agreements, Members of Congress, and representatives of the broad range of private sector interests affected by the agreements, including national business organizations, trade associations, labor unions, individual companies, research institutes and academicians, environmental groups, importers and exporters, and consumer interests. The Committee also received extensive written correspondence from private sector interests throughout the course of the negotiations and during the development of the implementing bill. Most of the concerns raised have been addressed either in the negotiations, in the implementing bill, or in the Statement of Administrative Action.

In addition to the hearings, Members of the Committee and the trade staff maintained close oversight of the negotiations through periodic briefings by Administration officials and attendance at negotiating sessions in Geneva. As Chair of the Trade Agreements Coordinating Group established by the Speaker to coordinate the Uruguay Round implementing legislation in the House, the Committee also arranged periodic Administration briefings on the negotiations for other committees of jurisdiction and for the entire House. That Group also coordinated the preparation of the draft implementing bill among House committees of jurisdiction.

To assist Members in assessing the impact of the agreements on the U.S. economy, the Committee jointly requested with the Senate Committee on Finance a study by the U.S. International Trade Commission under section 332(g) of the Tariff Act of 1930, which was completed in June 1994 (ITC No. 332–323), as described above under Benefits of the Uruguay Round Trade Agreements.

On May 16 and 26 and June 20 and 29, 1994, the Subcommittee on Trade considered in informal markup session draft proposals in conceptual form for Uruguay Round draft implementing legislation concerning matters within the jurisdiction of the Committee on Ways and Means (press release #8–A). The draft implementing proposal as amended in Subcommittee was transmitted to the full committee in conceptual form on July 11, and made available to the public. A Committee print of the proposals in draft legislative form to implement the Antidumping Agreement and corresponding provisions of the Subsidies Agreement was issued on July 12.

On July 14, 1994, the Committee on Ways and Means began informal markup of the draft implementing proposals recommended by the Subcommittee on Trade. On July 20, the full Committee completed its informal markup after adopting in conceptual form various amendments to the draft proposal and recommendations for inclusion in the Statement of Administrative Action under preparation by the Administration to accompany the implementing bill. Completion of the informal markup was subject to further discussions between Members and the Administration on certain specific issues (press release #28–A).

The draft implementing proposal, as amended, was prepared in legislative form, together with proposals of other committees of jurisdiction, in a consolidated House proposal as a basis for informal conference with Senate committees of jurisdiction. The House Ways and Means and Senate Finance Committees began an informal conference on provisions within their joint jurisdictions on August 19, 1994. The informal conference was completed between the two committees on September 20.

On September 28, 1994, the Committee on Ways and Means ordered favorably reported to the House H.R. 5110, the "Uruguay Round Agreements Act", submitted by the President to the Congress and introduced on September 27, by a rollcall vote of 35 ayes, 3 noes.

SECTION-BY-SECTION ANALYSIS, JUSTIFICATION, AND COMPARISON WITH PRESENT LAW

H.R. 5110 was referred jointly to eight committees in the House. The following analysis covers only those provisions of the implementing bill as ordered reported by the Committee on Ways and Means within its jurisdiction.

Section 1. Short title and table of contents

Section 1 of H.R. 5110 contains the short title of the Act, which may be cited as the "Uruguay Round Agreements Act", and sets forth the table of contents of the bill.

Section 2. Definitions

Section 2 of H.R. 5110 defines various terms used throughout the Act.

TITLE I—APPROVAL OF, AND GENERAL PROVISIONS RELATING TO, THE URUGUAY ROUND AGREEMENTS

Title I of H.R. 5110 contains four subtitles of general application relating to the Uruguay Round agreements, including approval of the agreements and the SAA, conditions for entry into force of the agreements for the United States, and the relationship of the agreements to United States and State laws; tariff modification authorities; provisions on implementation of the agreements and dispute settlement; and provisions related to future work under the WTO.

SUBTITLE A—APPROVAL OF AGREEMENTS AND RELATED PROVISIONS

Subtitle A contains the general provisions for approval of the Agreements, conditions for their entry into force for the United States, the relationship of the Uruguay Round agreements to United States and State laws, including detailed requirements for Federal-State consultations on implementation of agreement obligations and on dispute settlement; and implementing and regulatory provisions.

Section 101. Approval and entry into force of the Uruguay round agreements

Present law

As described in this report under Legislative Authority above, section 1103 of the Omnibus Trade and Competitiveness Act of 1988 provides authority for the Uruguay Round agreements to enter into force, subject to certain procedural requirements being met and congressional passage of an implementing bill approving the agreements and SAA under the "fast track" procedures of section 151 of the Trade Act of 1974.

Section 121 of the Trade Act of 1974 authorizes an annual appropriation to the GATT of such sums as may be necessary for U.S. payment of its share of GATT expenses.

Explanation of provision

Section 101 of H.R. 5110 approves the Uruguay Round agreements and sets forth provisions for their entry into force for the United States. Under subsection (a), Congress approves, pursuant to section 1103 of the 1988 Act and section 151 of the 1974 Act, the trade agreements resulting from the Uruguay Round entered into on April 15, 1994, and the Statement of Administrative Action proposed to implement these agreements, that were submitted to the Congress on September 27, 1994. As specified under section 102(d), this SAA shall be regarded as an authoritative expression by the United States in any judicial proceeding in which a question arises concerning the interpretation and application of the agreements and the Uruguay Round Agreements Act.

Subsection (d) lists the WTO Agreement, the 16 "multilateral" trade agreements included in Annexes 1 and 2 of the WTO Agreement, and two of the four "plurilateral" agreements included in Annex 4 that are approved by the Congress. The list does not include the plurilateral International Dairy Arrangement, to which the United States is currently not a party and has not signed, or the Agreement on Trade in Civil Aircraft, which the Congress approved in 1979 and has not changed since that time. The Trade Policy Review Mechanism, included in Annex 3 of the WTO Agreement, is a purely procedural mechanism that has been in place since 1989 and does not require congressional approval.

Subsection (b) authorizes the President to accept the Uruguay Round Agreements on behalf of the United States and implement Article VIII of the WTO Agreement (i.e., make provision for the extension of privileges and immunities in connection with the WTO) at such time as the President determines that a sufficient number of foreign countries are accepting the obligations to ensure the effective operation of, and adequate benefits for, the United States under those agreements. Subsection (c) authorizes annual appropriations of such sums as may be necessary for payment of the U.S. share of the WTO expenses.

Reasons for change

Article XIV of the WTO Agreement provides that current Contracting Parties to the GATT, such as the United States, may become parties to the WTO Agreement, and hence to the agreements annexed to that Agreement, by Depositing an instrument of acceptance with the Director General of the GATT.

The Committee believes that approval of the Uruguay Round trade agreements as submitted to the Congress is in the U.S. national interest for the reasons cited in the President's transmittal message and supporting documentation and described above in the Background and Purpose section of this report. As indicated in the accompanying SAA, the Administration does not intend to accept the WTO Agreement and its annexes unless the European Community, Japan, Canada, Mexico and other key developed and developing countries have agreed to be bound to those agreements at the same time. The Administration will also consult with the Committee before the President makes a determination that the conditions have been met for entry into force of the agreements for the United States.

Section 102. Relationship of the agreements to United States law and State law

Present law

Section 3 of the Trade Agreements Act of 1979 (the implementing legislation for the Tokyo Round of GATT multilateral trade agreements), section 102 of the U.S.-Canada FTA Implementation Act and of the NAFTA Implementation Act contain similar provisions as section 102 of H.R. 5110 described below concerning the relationship of the Uruguay Round agreements to U.S. and State laws and private right of action.

Explanation of provision

Section 102 of H.R. 5110 sets forth the relationship between provisions of the Uruguay Round agreements and U.S. and State domestic laws, and establishes a Federal-State consultation process on agreement implementation and dispute settlement.

Relationship to U.S. law.—Section 102 (a) that no provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any U.S. law shall have effect, i.e., U.S. law shall prevail if inconsistent with any provision of the agreements. Further, nothing in the Uruguay Round Agreements Act, unless specifically provided for in the Act, shall be construed to amend or modify any U.S. law, including any law regarding the protection of human, animal, or plant life or health; the protection of the environment; worker safety; or to limit any authority conferred under any U.S. law, including section 301 of the Trade Act of 1974.

Relationship to State law.—Section 102 (b) sets forth the relationship of the Uruguay Round agreements to State laws and establishes a Federal-State consultation process to facilitate implementation of obligations under the Uruguay Round agreements as they pertain to State laws. Upon enactment of the Act, the President shall consult with the States, through the intergovernmental trade policy advisory committees established under section 306 of the Trade and Tariff Act of 1984, to achieve conformity of State laws and practices with the agreements.

The U.S. Trade Representative (USTR) shall establish within the Office of the USTR a Federal-State consultation process for addressing issues relating to the agreements that directly relate to, or will potentially have a direct impact on, the States. This process will include procedures under which (1) the States will be informed on a continuing basis of matters under the agreements that directly relate to, or will potentially have a direct impact on, the States; (2) the States will be provided an opportunity to submit information and advice to the USTR on a continuing basis concerning those matters; and (3) the USTR will take into account the information and advice received from the States when formulating U.S. positions regarding those matters. The Federal Advisory Committee Act will not apply to this Federal-State consultation process.

In addition, subsection (b) establishes procedures for Federal-State cooperation on WTO dispute settlement involving State laws. When a WTO member requests consultations with the United States under the Dispute Settlement Understanding (DSU) concerning whether a State law is inconsistent with U.S. obligations under any Uruguay Round agreement, USTR will notify the Governor and chief legal officer of the State within seven days and will consult with State representatives within 30 days. USTR will also make every effort to ensure that the State is involved in the development of the U.S. position at each stage of the consultations and subsequent dispute settlement proceedings. If a panel or the Appellate Body finds that the State law is inconsistent with U.S. agreement obligations, USTR will consult with the State to seek to develop a mutually agreeable response and make every effort to ensure that the State is involved in the development of the U.S. position.

USTR will also notify and solicit views of State representatives at least 30 days before requesting consultations under the DSU regarding a subcentral government measure of another WTO member, or within three days after the request in exigent circumstances. The SAA spells out further details on how the consultation process between USTR and the States is intended to operate.

No State law (which includes any law of a political subdivision of a State, and any State law regulating or taxing the business of insurance), or application of a State law, may be declared invalid as to any person or circumstance on the ground that it is inconsistent with the Uruguay Round agreements, except in an action brought by the United States for the purpose of declaring the law or application invalid. At least 30 days before bringing an action, the USTR will provide a report to the House Ways and Means and Senate Finance Committees describing the proposed action, efforts to resolve the matter with the State by other means, and certifying that USTR has substantially complied with the consultation requirements. USTR will also consult with the Committees before bringing the action.

In any action brought by the United States against a State, (1) a dispute settlement panel or Appellate Body report shall not be considered binding or otherwise accorded deference; (2) the United States will have the burden of proving that the law or its application is inconsistent with the agreement; (3) any State whose interests may be impaired or impeded in the action will have the unconditional right to intervene in the action as a party and the United States will be entitled to amend its complaint to include a claim or cross-claim; and (4) any State law shall not be deemed invalid before court judgment is final and all timely appeals are exhausted.

Private remedies.—Subsection (c) provides that no person other than the United States (1) shall have any cause of action or defense under any of the Uruguay Round agreements or by virtue of Congressional approval of those Agreements; or (2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with the agreements. By this provision, the Congress intends to occupy the field with respect to any cause of action or defense under or in connection with any Uruguay Round agreement.

Reasons for change

The Uruguay Round Agreements Act incorporates all amendments to existing Federal statutes or provision of new authorities, including authority for Federal agencies to issue regulations, known to be necessary or appropriate to enable full implementation of, and compliance with, U.S. obligations under the agreements. Those provisions of U.S. law that are not addressed by the implementing bill are left unchanged. In the unlikely event that any future changes in Federal statutes should be necessary to remedy an unforeseen conflict between requirements of a Federal law and the agreements, such changes can be enacted in subsequent legislation.

This treatment is consistent with the Trade Agreements Act of 1979 implementing the Tokyo Round of multilateral trade negotiations, the U.S.-Israel Free Trade Area Implementation Act of 1985, the U.S.-Canada FTA Implementation Act of 1988, and the NAFTA Implementation Act, all of which provide that U.S. laws prevail over any conflicting provision of the international agreements. This treatment is also consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements. Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are not self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissable under the terms of the statute.

A number of the Uruguay Round agreements consist of provisions relating to State and local, as well as Federal, laws and regulations. However, the agreements do not automatically preempt or invalidate State laws that do not conform to the agreements even if there is a dispute settlement finding that the State measure is inconsistent. The Federal-State consultation requirements in section 102(b) build upon and expand the procedures established for NAFTA implementation in order to address concerns expressed by

State representatives about the potential impact of agreement obligations on State laws and the need for their involvement in any disputes concerning those laws.

The Committee expects the USTR, as lead agency, to implement fully the consultative provisions in order to ensure the greatest possible cooperation between the Federal Government and the States in complying with agreement obligations. At the same time, the Committee seeks to minimize the administrative burden imposed on the USTR and expects the States to establish contact points and otherwise fully cooperate with the USTR as anticipated in the SAA. While section 102 makes clear that only the Federal Government retains the right to challenge, including through court action, an unresolved conflict between any State law or its application and a Uruguay Round agreement, this authority is intended to be used only as a last resort in the unlikely event that consistency is not achieved through the consultative process. The SAA also sets forth various considerations for the Attorney General in determining whether to exercise this authority, as well as the parameters for any court action.

As is the case with other international trade agreements, a private party does not have the right to sue a Federal, State, or local government or a private party (or raise a defense against such a party in a suit) on grounds of consistency or inconsistency with the Uruguay Round agreements. Also, there is no private right of action to challenge, under any other law, any action or inaction by the United States or a State or local government on the ground that it is inconsistent with the Uruguay Round agreements. For example, a private party cannot bring an action to require, preclude, or modify government exercise of discretionary or general "public interest" authorities under other provisions of law. These prohibitions are based on the premise that it is the responsibility of the Federal Government, and not private citizens, to ensure that Federal or State laws are consistent with U.S. obligations under international agreements such as the Uruguay Round agreements. In addition section 102 and the SAA make clear that Congress seeks the complete preclusion of Uruguay Round agreement-related actions and defenses in respect of State law in any action or proceeding brought by or against private parties.

Section 103. Implementing actions in anticipation of entry into force; regulations

Present law

Section 105 of the U.S.-Canada FTA Implementation Act and section 104 of the NAFTA Implementation Act authorized implementing actions in anticipation of entry into force of the U.S.-Canada FTA and the NAFTA and established timeframes for issuing implementing regulations.

Explanation of provision

Section 103 of H.R. 5110 authorizes the President to proclaim such actions and for other appropriate U.S. Government officials to issue such regulations, as may be necessary to ensure that any provision of the Act, or any amendment made by the Uruguay Round

Agreements Act, that takes effect on the date any of the Uruguay Round agreements enter into force for the United States is appropriately implemented on that date. No such proclamation or regulation may have an effective date earlier than the date of entry into force of the agreement.

Any interim regulations necessary or appropriate to carry out actions proposed in the SAA to implement the Uruguay Round Agreements on Antidumping, on Subsidies and Countervailing Measures, and on Safeguards shall be issued no later than one year after the date of entry into force of the agreement for the United States.

REASONS FOR CHANGE

These provisions are intended to ensure full implementation of U.S. obligations under the Uruguay Round agreements upon their entry into force and the issuance of all Federal regulations as early as possible, particularly with respect to those agreements whose implementation may involve significant regulatory changes.

SUBTITLE B—TARIFF MODIFICATIONS

Section 111. Tariff modifications

Present law

Section 1102(a) of the Trade Act of 1988 authorizes the President to enter into trade agreements with foreign countries and to proclaim modifications in U.S. rates of duty necessary or appropriate to carry out such agreements, subject to the following limitations:

Duty reductions cannot exceed 50 percent, except that duties of 5 percent ad valorem or below may be reduced to zero;

Duty reductions on any article cannot exceed 3 percent ad valorem per year, or one-tenth of the total reduction, whichever is greater, except that "staging" is not required if the U.S. International Trade Commission (ITC) determines that there is no U.S. production of the article. Reductions may not be phased in over more than a 10-year period;

In order to simplify computations, limited "rounding authority" is provided.

Any duty reduction that exceeds the limits set forth in section 1102, or any duty increase, may take effect only if approved by Congress as part of a fast-track implementing bill.

Section 251 of the Trade Expansion Act of 1962 and section 126(a) of the Trade Act of 1974 require application on a most-favored-nation (NFN) basis of any duty, duty-free treatment, or other import restriction proclaimed to carry out a trade agreement.

Explanation of provision

Section 111 of H.R. 5110 contains various authorities for the President to proclaim tariff modifications. Subsection (a) provides the President authority, in addition to the authority under section 1102(a) of the 1988 Act, to proclaim other duty modifications, staged rate reductions, or additional duties as the President determines to be necessary or appropriate to carry out the Uruguay Round U.S. Schedule XX of tariff commitments.

Subsection (b) authorizes the President to proclaim, subject to the consultation/layover requirements set forth in section 115, (1) the modification of any duty or staged rate reduction set forth in Schedule XX if the United States agrees to the modification or reduction in a WTO multilateral negotiation and it applies to the duty on an article in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round; and (2) modifications necessary to correct technical errors, or to make other rectifications to, Schedule XX.

Subsection (c) authorizes the President, after consulting with the House Ways and Means and Senate Finance Committees, to proclaim increased duties on imports from countries that are not members of the WTO, or to which the United States does not apply the WTO, if he determines that the country is not according adequate trade benefits to the United States, including substantially equal competitive opportunities. The maximum rate of duty that may be proclaimed is the higher of the current MFN rate or the MFN rate of duty that will apply under the Uruguay Round Schedule XX.

Subsection (d) authorizes the President to proclaim increases in duties under column 2 of the United States Harmonized Tariff Schedule (HTS) as specified in the subsection for a list of agricultural and other products. Column 2 rates apply to imports from countries to which the United States does not grant MFN treatment. An increase in column 2 rates for these products is necessary in order to ensure that those rates are at least as high as those in column 1, which sets out the MFN rate of duty.

Subsection (e) authorizes the President to consolidate subheadings in the HTS when the same rate of duty applies under column 1 to all products in those subheadings. In such cases, the highest rate of duty provided for the relevant products in column 2 will be the Column 2 rate for the consolidated subheading.

Reasons for change

Section 111(a) provides the President authority, supplemental to the authority under section 1102 of the 1988 Act, to proclaim the modifications in rates of duty necessary or appropriate to carry out the U.S. tariff commitments agreed upon in the Uruguay Round. Those commitments are embodied in the U.S. schedule annexed to the Marrakesh Protocol to GATT 1994 (Schedule XX).

Although Schedule XX generally provides for the reduction of U.S. tariffs, section 111(a) includes authority for the President both to lower and to increase U.S. duties. The additional authority to lower duties is necessary in particular to implement reciprocal tariff elimination in certain sectors involving duties above 5 percent ad valorem. Authority to increase tariffs is necessary to take account of the fact that Schedule XX calls for an increase in tariffs on agricultural products whose importation into the United State is currently subject to quotas or other nontariff restrictions. The new, higher duty rates for those products will replace the quantitative restrictions currently in effect, as part of the general commitment by WTO countries to covert nontariff restrictions on agricultural trade to tariffs ("tariffication").

Section 111(b) provides the President proclamation authority to complete "zero-for-zero" tariff elimination as well as accelerated staging of rate reductions and rate harmonization in those sectors where these U.S. objectives could not be achieved in the Uruguay

Round negotiations. A number of domestic industries, as reflected in the SAA, have expressed strong interest in pursuing these goals under the WTO. In addition, subsection (b) provides the President residual authority to make technical corrections and rectifications to Schedule XX. However, this authority may not be used by the President to expand the scope of commitments under Schedule XX.

Subsection (c) provides the President with tariff authority to use if a country attempts to "free-ride" on U.S. benefits conferred under the WTO by delaying its membership. In the absence of this authority, U.S. law would generally require imports from such countries to be subject to the more favorable WTO rate of duty. The Committee expects USTR to consult closely on the use of this authority to ensure reciprocal tariff benefits.

The products included under subsection (d) are those for which duty rates under column 1 will be increased as a replacement for existing quantitative restrictions under the general Uruguay Round agreement regarding to "tariffication" of restrictions of that kind. In the absence of an increase in column 2 rates, they would be lower than the MFN rate of duty negotiated in the Uruguay Round. The authority under subsection (e) to consolidate HTS subheadings will enable simplification of the tariff schedule when a uniform rate of duty applies.

Section 112. Implementations of schedule XX provisions on ship repairs

Present law

Section 466 of the Tariff Act of 1930, as amended, imposes a 50 percent duty on non-emergency foreign repairs of U.S. vessels; this is reflected in a note in the Harmonized Tariff Schedule. Section 484E of the Customs and Trade Act of 1990 exempted LASH (Lighter Aboard Ship) barge repairs, and spare repair parts for all cargo vessels, from this duty. (LASH barges are cargo containers that can be floated up river once delivered to a port.) Under this provision, no duty was imposed on the repair parts and the costs of the repairs, while spare repair parts entered at the applicable duty rates under the HTS, rather than at the 50 percent rate. This provision expired December 31, 1992.

Explanation of provision

Section 112 of H.R. 5110 amends section 484E(b) of the 1990 Act and section 466(h) of the Tariff Act of 1930 to make duty exemptions on LASH (Lighter Aboard Ship) barges permanent.

Reasons for change

Section 112 is required to carry out U.S. commitments in Schedule XX not to impose duties on the foreign repair of LASH barges and on the cost of foreign spare parts used to repair such vessels. Unlike other commitments in Schedule XX, which can be implemented by Presidential proclamation, this change must be made in the statute.

Section 113. Liquidation or reliquidation and refund of duty paid on certain entries

Section 114. Modifications to the HTS

Present law

No provision.

Explanation of provision

Section 113 of H.R. 5110 amend the HTS and other provisions of U.S. law to permit the Secretary of the Treasury to liquidate or reliquidate entries of agglomerated stone tiles and clomiphene citrate and, on request, to refund any duty or excess duty paid. Liquidation or reliquidation may be made only if a request is filed with the Customs Service within 180 days after the WTO enters into force for the United States that contains sufficient information for Customs to locate or reconstruct the entry.

Section 114 amends the HTS with respect to raw wool and authorizes the President to proclaim duty-free treatment for octadecyl isocyanate and 5-chloro-2-(2,4-dichlorophenoxy) phenol, effective on the date the President proclaims tariff modifications to implement the Uruguay Round Schedule XX.

Reasons for change

These provisions are necessary to correct long-standing errors in classification of certain products in the HTS that are corrected prospectively in Schedule XX, or to correct omissions in the preparation of that Schedule.

Section 115. Consultation and layover requirements for, and effective date of, proclaimed actions

Present law

Section 103 of the U.S.-Canada FTA Implementation Act and the NAFTA Implementation Act established consultation and layover requirements identical to the provisions carried forward in section 115 of H.R. 5110.

Explanation of provision

Certain provisions of H.R. 5110 specifically authorize the President to implement actions by proclamation, subject to the consultation and layover requirements of section 115. Those actions may be proclaimed only if (1) the President has obtained advice regarding the proposed action from the appropriate private sector advisory committees established under section 135 of the Trade Act of 1974 and from the International Trade Commission; (2) the President has submitted a report to the House Ways and Means and Senate Finance Committees setting forth the proposed action and reasons therefor, and the advice obtained; and (3) at least 60 calendar days have expired beginning with the first day on which the first two requirements are met, during which period the President has consulted with the Committees regarding the proposed action.

Reasons for change

The consultation and layover requirements ensure that U.S. domestic interests most directly affected and Congressional committees are consulted and have adequate opportunity to provide their input and views before substantive changes in the application of the Uruguay Round agreements are implemented.

Section 116. Effective date

Subtitle B and the amendments made by this subtitle take effect on the date the WTO Agreement enters into force for the United States, except for section 114(a) (on raw wool) and section 115, which takes effect on date of enactment.

SUBTITLE C—URUGUAY ROUND IMPLEMENTATION AND DISPUTE SETTLEMENT

Subtitle C contains procedural requirements for notice, consultation, and reporting to ensure access to, and advice by, Congressional committees, private sector advisory committees, and the public regarding the dispute settlement process under the WTO that affects U.S. interests.

Section 121. Definitions

Section 121 defines various terms used in Subtitle C.

Section 122. Implementation of Uruguay round agreements

Present law

No provision.

Explanation of provision

Section 122 of H.R. 5110 sets forth the objective of the United States to ensure that the WTO continues the practice followed by the GATT of decisionmaking by consensus. The USTR will consult with the House Ways and Means and Senate Finance Committees and other appropriate committees of jurisdiction (appropriate Congressional committees) before any vote is taken in the WTO that would substantially affect U.S. rights or obligations under the WTO Agreement or another multilateral trade agreement or potentially entails a change in Federal or State law. Within 30 days after the end of any year in which the WTO takes such a vote, the USTR will submit a report to the appropriate Congressional committees describing the decision, U.S. efforts to achieve consensus, country voting, how the decision affects the United States, and the President's response. USTR will also consult with the committees promptly after submission of the report.

Reasons for change

Section 122 was developed as a reflection of Committee concerns about the direction the WTO might take over the coming years compared with past policies and practices of the GATT. Members want to closely scrutinize the decisions taken by the WTO, particularly in those cases where voting occurs. Since the presumption is that the WTO will operate by consensus, as did the GATT, there should be few instances where decisionmaking by vote would impact on the interest of the United States or require changes in Federal or State law. However, since the competencies of the WTO have been somewhat expanded compared with the GATT, Members will look to the USTR report to measure whether consensus decisionmaking is still being followed.

At least one hundred and sixteen nations will join the U.S. as members of the WTO. As a leading member, the United States should foster policies and practices that ensure that the WTO remains a trade-oriented organization, the influence of the leading economies is not thwarted by countries that only participate marginally in the world economy, and the United States is able to fully protect its economic interests and its sovereignty.

Section 123. Dispute settlement panels and procedures

Present law

No provision.

Explanation of provision

Section 123 of H.R. 5110 sets forth WTO panel roster requirements and the notice, consultation, and reporting procedures USTR will follow with Congressional committees throughout the course of any dispute settlement proceeding involving the United States.

Panelists.—The President will review annually the WTO panel roster and include the roster and list of persons serving on the Appellate Body in the annual report to the Congress on the trade agreements program required under section 163(a) of the Trade Act of 1974. The USTR will seek to ensure that persons appointed to the roster are well-qualified and that the roster includes persons with expertise in the Uruguay Round subject areas, and will inform the President of persons nominated by other countries. The USTR will also seek establishment of rules governing conflicts of interest by persons serving on panels and the Appellate Body and include a description in the annual report of any progress made.

Dispute settlement proceedings.—Promptly after a dispute settlement panel is established to consider the consistency of Federal or State law with any Uruguay Round Agreement, the USTR must notify the appropriate Congressional committees of the nature of the dispute, the identity of the persons serving on the panel, and whether there was any departure from consensus on panelist selection. If the panel report is appealed, USTR will also promptly notify those committees of the issues under appeal and the identity of the persons serving on the Appellate Body.

Promptly after circulation of the panel or Appellate Body report to WTO members, USTR shall notify the appropriate Congressional committees of the report and consult with the committee concerning any appeal of a panel report. If the report is adverse to the United States, USTR must also consult with the committees on whether to implement the report's recommendation and, if so, on the manner and timing of implementation.

If the panel or Appellate Body finds in its report that a regulation or practice of a U.S. department or agency (other than the International Trade Commission) is inconsistent with any Uruguay Round agreement, that regulation or practice may not be modified to implement the report unless and until (1) the appropriate Congressional committees have been consulted; (2) USTR has sought advice regarding the modification from relevant private sector advisory committees; (3) the proposed modification and an explanation have been published in the *Federal Register* for public comment; (4) USTR has submitted a report to the appropriate Congressional committees describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under (2); (5) USTR and the relevant department or agency head have consulted with the appropriate Congressional committees on the proposed contents of the final rule or other modification; and (6) the final rule or other modification has been published in the *Federal Register*.

This final rule or other modification cannot go into effect before the end of 60 days after consultations on the proposed contents (under (5) above) begin, unless the President determines an earlier effective date is in the national interest. During this period, the House Ways and Means and Senate Finance Committees may vote to indicate their agreement or disagreement with the proposal. The vote will not be binding on the department or agency implementing the rule or other modification.

The USTR will consult with the House Ways and Means and Senate Finance Committee on U.S. policy concerning the full review that will be conducted of the rules and procedures of the WTO within four years after the WTO Agreement enters into force.

Reasons for change

The provisions of section 123 reflect the importance of selecting highly qualified persons to serve on the WTO dispute settlement panels and Appellate Body and for the United States to take a lead role in ensuring, to the extent possible, that this objective is met.

The Committee also emphasizes the critical importance of close consultation by the Administration with Congressional committees of jurisdiction on dispute settlement cases brought against the United States, as required under section 123. Compliance with these provisions will ensure that any modifications to regulatory practice as well as statutory changes to comply with dispute settlement findings are made with the full knowledge of the Congress.

Section 124. Annual report on the WTO

Present law

No provision.

Explanation of provision

Section 124 of H.R. 5110 requires that the USTR submit an annual report to Congress, not later than March 1 of each year beginning in 1996, which would describe the major activities and work programs of the WTO, the composition and salaries of WTO personnel, and details of dispute-settlement actions over the preceding year. The report also will include an assessment of the program made on achieving greater openness and public awareness of WTO decisions and activities.

Reasons for change

Members have been concerned about the transition from the GATT to the WTO and whether the expansion of the competencies and authorities under the new structure will lead to a significantly different organization than existed under the GATT or was contemplated at the time the agreement was approved.

The annual report is designed to provide comprehensive information about the structure and activities of the WTO so the Congress can be assured that the new organization will continue to operate by consensus, as did the GATT, will not unduly increase the level of bureaucracy, will not intrude on the sovereignty of individual nations, and remains responsive to the interests of the United States. Such oversight was felt to be essential in maintaining the confidence of Congress in the WTO as an effective forum for sovereign nations to develop and enforce common trade rules and provide mechanisms for settling disputes.

Section 125. Review of participation in the WTO

Present law

No provision.

Explanation of provision

Section 125 of H.R. 5110 provides for a review of U.S. participation in the WTO every five years. At the end of the fifth year, and every fifth year thereafter, USTR is required to include in the annual report required under section 124 an analysis of the effects of the WTO Agreement on the interests of the United States, the costs and benefits of U.S. participation in the WTO, and the value of continued participation. During the 90-legislative day period following submission of this report and analysis, Congress may vote on a joint resolution disapproving the continued participation of the U.S. in the WTO. Such a resolution may be introduced by any Member and would be referred to the House Ways and Means and Senate Finance Committees; the committees would be automatically discharged from further consideration after 45 legislative days. Consideration of the resolution would be subject to the "fast track" rules of the House and Senate under section 152 of the Trade Act of 1974.

Reasons for change

The purpose of this provision is to provide an opportunity for Congress to evaluate the transition of the GATT to the WTO and to assess periodically whether continued membership in this organization is in the best interest of the United States. It is the desire of the Committee not to leave this decision totally in the hands of the Executive Branch but to be active in determining whether the WTO is an effective organization for achieving common trade goals and principles and for settling trade disputes among sovereign nations.

In the course of the five-year review, individual members of Congress can evaluate whether the WTO remains on course as a trade-oriented organization and has not expanded its activities to non-trade related areas. Congress wants to ensure that the United

States can continue to exercise substantial influence within the WTO and successfully promote goals that benefit American producers, workers and consumers.

Section 126. Increased transparency

Present law

No provision.

Explanation of provision

Section 126 of H.R. 5110 directs the USTR to seek adoption by the functional bodies of the WTO of procedures that will ensure broader application of the principle of transparency.

Reasons for change

Through the adoption of more open and equitable procedures, it is the intention of the United States to improve our ability to assess the costs and benefits of WTO trade policy actions. Members have been concerned, particularly with respect to dispute settlement panels and the Appellate Body, that closed meetings and the lack of public availability of documents upon which decisions are based serve to undermine confidence in the decisions of these functional bodies.

Although it is more traditional in international bodies to conduct meetings and make decisions behind closed doors, the Committee believes that the WTO will gain more respect and build confidence if they follow the U.S. experience of providing more open access to the public with respect to key policy or dispute-settlement determinations. It has become a high priority for the U.S. to persuade other member nations of the WTO to work with us to open the process, provide greater access, provide for voices of dissent and differing views to be heard, and in general make the WTO more accountable to those who are affected by international decision-making.

Section 127. Access to the WTO dispute settlement process

Present law

No provision.

Explanation of provision

Section 127 of H.R. 5110 establishes procedures for the USTR to inform, consult, and report to the Congress, private sector advisory committees, and the public during each stage of the dispute settlement process in any case involving the United States.

At each stage of any panel or Appellate Body proceeding in which the United States is a party, USTR will consult with the appropriate Congressional committees, the relevant private sector advisory committees, and the petitioner (if any) if the case involves a section 301 investigation. In addition, USTR will consider the views of appropriate interested private sector and nongovernmental organizations concerning the matter.

Promptly after establishment of the panel, USTR will publish a notice in the *Federal Register* identifying the parties to the dispute, setting forth the major issues raised and the legal basis of the complaint, identifying the specific measures cited in the request for the panel, and seeking written comments from the public on the issues raised. The USTR will take into account any advice received from the Congressional and advisory committees and the written comments in preparing U.S. submissions to the panel or Appellate Body.

The USTR will make U.S. written submissions available to the public promptly after they are submitted to the panel or Appellate Body. The USTR may withhold from disclosure any information that its provider identifies as proprietary or which is treated as confidential by a foreign government. The USTR will make each panel and Appellate Body report in a proceeding to which the United States is a party available to the public promptly after it is circulated to WTO members and inform the public of its availability. The USTR will also request each other WTO member country that is party to a dispute with the United States to permit the release of their written submissions to the public. In any proceeding under the DSU, irrespective of whether the dispute involves the United States, USTR will request each party to provide non-confidential summaries of its written submissions, and will make those summaries available to the public promptly after they are received.

The USTR will maintain a file accessible to the public on each proceeding under the DSU to which the United States is a party. The file will include all U.S. submissions in the proceeding and a listing of any submissions to the USTR from the public, as well as the reports of the panel and Appellate Body.

Reasons for change

Section 127 establishes procedures for ensuring that Congress, the public, and the private sector have access to information on, and are kept advised of, any dispute settlement proceedings under the WTO to which the United States is a party, and that their views are solicited and taken into account in the formulation of U.S. positions in such proceedings. The Committee intends to conduct close oversight, including through public hearings, on the dispute settlement process and expects the Administration to fully comply with the procedures for access to information and consultation with private sector interests affected by any dispute, as well as with the Congress, throughout the course of proceedings.

Section 128. Advisory committee participation

Present law

Section 135 of the Trade Act of 1974, as amended, establishes a private sector advisory committee structure to provide information and advice to the President and Executive branch agencies on trade policy and negotiations and to report to Congress their views on trade agreements. Section 135(b) requires the President to establish an Advisory Committee for Trade Policy and Negotiations (ACTPN) to provide overall policy advice consisting of representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, and consumer interests.

Explanation of provision

Section 128 of H.R. 5110 amends section 135(b) to include representation of nongovernmental environmental and conservation organizations in the ACTPN.

Reasons for change

The amendment codifies existing practice of the current Administration to include representation of environmental interests in the overall advisory committee on U.S. trade policy and negotiations. As indicated in the SAA, the current Administration will maintain the existing policy advisory committee on environmental and conservation matters, and will seek the views and advice of the ACTPN and the environmental policy committee with respect to environmental issues associated with trade policies or trade agreements.

Section 129. Administration action following WTO panel reports

Present law

No provision.

Explanation of provision

Setion 129 of H.R. 5110 establishes a procedure by which the USTR may obtain advice it requires to determine whether implementation of the recommendation of an adverse WTO panel or Appellate Body report concerning U.S. obligations under the Agreement on Safeguards, Antidumping, or Subsidies and Countervailing Measures would necessitate legislation. Section 129 also establishes a mechanism that permits the agencies concerned (the Department of Commerce (Commerce) and the U.S. International Trade Commission) to issue a second determination, where such action is appropriate, to respond to the recommendations in a WTO panel or Appellate Body report.

Actions by the ITC.—Section 129(a) provides authority for USTR, following issuance of an interim report from a panel or report from the Appellate Body that has found an action of the ITC to be inconsistent with U.S. obligations under the relevant agreement, to request the Commission to issue an advisory report on whether Title VII of the Tariff Act of 1930 or title II of the Trade Act of 1974, as the case may be, permits the ITC to take steps in connection with the particular proceeding that would render its action "not inconsistent with" the findings concerning those obligations. The USTR will notify the House Ways and Means and Senate Finance Committees of the request.

As indicated in the SAA, the purpose of the USTR request will be to determine whether the ITC can take action under existing U.S. law "not inconsistent with" the panel or Appellate Body recommendation. The ITC will examine the full range of its discretion under U.S. law and, based on that examination, will advise the USTR whether the law is reasonably susceptible of an interpretation that would allow the agency to take action "not inconsistent with" the report's recommendations. Because the ITC's report is solely advisory, it is not subject to judicial review.

The ITC must transmit its advisory opinion in the case of an interim panel report within 30 calendar days of the USTR request and within 21 calendar days of the request in the case of an Appellate Body report. These timeframes are set with a view to the timeframes under the DSU for adoption and implementation of reports, in order to ensure that USTR will receive the advice in time to decide whether to appeal a panel's interim report or whether to implement an adverse report, and to estimate how long an implementation period may be required.

Subsection (a) does not require USTR to request the ITC to make a second determination, even if a majority of the Commission advises that the ITC can take action consistent with existing law. If a majority of the Commission issues an affirmative report, the USTR must consult with the Committees concerning the appropriate response to the report.

If a majority of the ITC has advised that it may take action consistent with U.S. law to render its actions not inconsistent with an adverse report, the USTR may require the ITC to take such action. If a majority of the ITC has issued an affirmative advisory report, the Commission, upon written request of the USTR, shall issue a determination in connection with the particular proceeding that would render the Commission's action not inconsistent with the panel or Appellate Body findings. The determination will be issued within 120 days after the request.

The USTR will consult with the Congressional committees on the ITC's determination prior to the implementation of the determination. If, as a result of the Commission's determination, an antidumping or countervailing duty order is no longer supported by an affirmative determination, the USTR may, after consulting with the Congressional committees, direct Commerce to revoke the order in whole or in part to implement that determination.

With respect to import relief actions under Title II of the 1974 Act, the President may reduce, modify, or terminate action under section 203 of that Act after receiving the ITC determination and consulting with the Congressional committees.

Actions by Commerce.—Section 129(b) requires the USTR to consult with Commerce and the Congressional committees promptly after issuance of a panel or Appellate Body report finding that an action by Commerce in an antidumping or countervailing duty proceeding is not in conformity with U.S. obligations under the Antidumping or Subsidies and Countervailing Measures Agreements. After these consultations the USTR may direct Commerce to make a determination that is "not inconsistent with" the report's recommendations, and may direct Commerce to implement this determination.

Within 180 days after receiving a written request from USTR, Commerce shall issue a determination in connection with the particular proceeding that would render its action "not inconsistent with" the findings of the panel or Appellate Body. The USTR will consult again with Commerce and the Congressional committees before directing Commerce to implement any determination.

As described in the SAA, implementation by Commerce of an adverse finding is a two-step process. First, USTR would direct Commerce to make a new determination. Second, USTR may direct

Commerce to implement that determination. If USTR directs Commerce to implement the second determination, Commerce may do so even if litigation is pending with respect to the initial agency determination. On the other hand, USTR may decline to request implementation of the second determination. The SAA cites various instances in which a new determination would not be necessary or implementation of a new determination would not be needed as a matter of domestic law.

Effects of determinations.—As provided in section 129(c), determinations by the ITC or Commerce implemented under subsections (a) or (b) concerning antidumping or countervailing duties shall have prospective effect only, consistent with the principle that GATT panel recommendations apply only prospectively. Such determinations shall apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs implementation. Entries made prior to the date of the USTR's direction would remain subject to potential duty liability.

Commerce or USTR must publish notice in the *Federal Register* of the implementation of determinations under section 129 so that private parties are aware of the effective date of an implemented determination. Section 129(d) requires Commerce or the ITC, as the case may be, to provide interested parties with an opportunity to submit written comments prior to issuing a second determination. The agencies may also may hold a hearing in appropriate cases.

Section 129(e) amends section 516A of the Tariff Act of 1930 to provide for review by the courts and NAFTA binational panels of new Title VII determinations made by Commerce or the ITC under section 129 that are implemented. The subsection also establishes the time available for filing an appeal with the court or with a binational panel. Section 129 determinations that are not implemented will not be subject to judicial or binational panel review, because such determinations will not have any effect under domestic law.

Reasons for change

As indicated in the Statement of Administrative Action, many of the ITC's proceedings are time limited by statute and the ITC cannot revisit its actions in those proceedings in the absence of the authority provided by section 129(a) or a remand. A written request by USTR will provide authority for the ITC to take action with respect to such matters. A Commissioner who was not part of the majority issuing an affirmative advisory report and who considers that existing U.S. law does not permit action "not inconsistent with" the findings of the panel or Appellate Body would be expected not to participate in the determination. Any such Commissioner could, however, append views on the matter to the ITC determination.

USTR will not refer a matter to the ITC unless a majority of Commissioners provided an affirmative advisory opinion. Although required to make a determination following the receipt of a request, the ITC will decide independently on the steps it will take to render its actions "not inconsistent with" the panel or Appellate Body findings.

As stated in the SAA, the requirement for USTR to consult with Commerce is intended to ensure that the USTR benefits from Commerce administrative and substantive expertise in the evaluation of panel or Appellate Body findings and the development of implementing action, if any. Commerce would be expected to provide USTR advice on (1) whether implementation of the findings is permissible under the antidumping or countervailing duty law; (2) the implications for the administration of these laws of implementing the findings; and (3) the most desirable method of implementing the findings and the time required to do so.

Under the authority provided by section 129, the USTR may request the ITC or Commerce to take action "not inconsistent with" a panel or Appellate Body report only if such action is in accord with existing U.S. antidumping, countervailing duty, or safeguards law, as the case may be. If U.S. law precludes such action, the Administration would need to request the Congress to enact legislation to address the conflict between U.S. law and the Uruguay Round agreement in question.

Section 129 requires consultations with the Committee at each stage of the process. The Committee intends to exercise close oversight of this process and expects to play an important role in the determination of whether to comply with panel findings as well as with decisions on implementation through legislation or changes in administrative practice.

Section 130. Effective date

Subtitle C and the amendments made by this subtitle take effect on the date the WTO Agreement enters into force for the United States.

SUBTITLE D—RELATED PROVISIONS

Section 131. Working Party on worker rights

Present law

No provision.

Explanation of provision

Section 131 of H.R. 5110 requires the President to seek the establishment in the GATT 1947, and, upon entry into force of the WTO Agreement with respect to the United States, in the WTO, of a working party to examine the relationship of internationally recognized worker rights, as defined in section 502(a)(4) of the Trade Act of 1974, to the articles, objectives, and related instruments of the GATT 1947 and of the WTO, respectively.

Section 131 provides that the objectives of the working party are to—

(1) explore the linkage between international trade and internationally recognized worker rights, as defined in section 502(a)(4) of the Trade Act of 1974, taking into account differences in the level of development among countries;

(2) examine the effects on international trade of the systematic denial of such rights;

(3) consider ways to address such effects; and

(4) develop methods to coordinate the work program of the working party with the International Labor Organization.

Finally, this section requires the President to report to Congress, not later than one year after the date of enactment of H.R. 5110, on the progress made in establishing the working party, and on U.S. objectives with respect to its work program.

Reasons for change

The Committee recognizes the concern raised with respect to the relationship between worker rights and international trade and therefore requires that the President seek the establishment of a GATT/WTO working party to examine, and to seek consensus among the members of the GATT/WTO on the nature of, this relationship.

Section 132. Implementation of rules of origin work program

Present law

No provision.

Explanation of provision

Section 132 of H.R. 5110 specifies that the President may implement an agreement developed under Article 9 of the Uruguay Round Agreement on Rules of Origin under U.S. law only pursuant to authority granted to the President in future legislation.

Part IV of the Agreement on Rules of Origin establishes a three-year work program to harmonize rules of origin among WTO members on non-preferential trade. The WTO Ministerial Conference will establish the new harmonized rules as an annex to the Agreement and will set a timetable for the annex to enter into effect. The addition of the annex will require an amendment of the Agreement.

The mew harmonized global rules of origin resulting from the work program could have a significant impact on international trade patterns, on the conduct of U.S. importers and exporters, and on the international competitiveness of U.S. industries. The Committee intends to conduct close oversight of U.S. participation in the work program and of proposals to change existing rules of origin. The Committee believes that the importance of any new agreement establishing uniform rules of origin worldwide warrants a grant of legislative authority for such rules to be implemented by the United States. The Committee expects any proposals and positions for U.S. participation in the work program to be developed on the basis of expertise from various appropriate agencies, including the International Trade Commission, and with full opportunity for advice and input from the private sector likely to be affected by any rules changes.

Section 133. Membership in WTO of boycotting countries

Present law

Section 8(a) of the Export Administration Act of 1979 (as in effect on August 20, 1994) prohibits U.S. persons from taking action with the intent to comply with, further, or support any foreign country boycott against any country friendly to the United States (primarily Arab states against Israel).

Explanation of provision

Section 134 of H.R. 5110 expresses the sense of the Congress that the USTR should vigorously oppose the admission into the WTO of any country which participates in any boycott or secondary boycott described in section 8(a) of the Export Administration Act of 1979.

Reasons for change

The Arab boycott of Israel extends to American companies doing business with Israel. As a result, U.S. companies that morally and legally do not abide by the boycott on Israel are put at a great disadvantage in the Arab markets in the Middle East. The Arab boycott is a clear violation of the principles of free and fair trade on which the GATT is based.

Section 133 is consistent with the prerequisites for countries to accede to the GATT or the WTO, which require that countries undertake agreement obligations. These include GATT Article XI, which generally prohibits quantitative restrictions on imports and exports.

Section 134. Africa trade and development policy

Present law

Under section 332 of the Tariff Act of 1930, the U.S. International Trade Commission must undertake investigations and provide reports upon the request of the President, the House Committee on Ways and Means, the Senate Committee on Finance, or either branch of Congress.

Explanation of provision

Section 134(a) of H.R. 5110 directs the President to develop and implement a comprehensive trade and development policy for the countries of Africa.

Section 134(b) requires the President, not later than twelve months after the date of enactment of H.R. 5110, and annually thereafter for a period of four years, to submit reports to the House Committees on Ways and Means and Foreign Affairs, to the Senate Committees on Finance and Foreign Relations, and to other appropriate Congressional committees, on steps taken to carry out the policy that section 134(a) directs the President to develop and implement.

The Committee notes that the Administration intends to establish a senior-level, interagency policy working group, chaired by the U.S. Trade Representative, to develop an Africa trade and development policy, and a private-sector advisory committee to assist this working group.

The Committee also emphasizes that the Administration's Africa trade and development policy should include measures to—

(1) promote, facilitate, and remove impediments to, U.S. trade with, and investment in, Africa including—

(i) accelerated negotiation of bilateral investment treaties with African countries; and

(ii) enhancements in the Generalized System of Preferences program for least-developed beneficiary countries, including those in Africa;

(2) urge the WTO to consider ways to integrate African countries more fully into the international trading system, and to implement the ministerial decisions on food needs and food aid and on measures in favor of the least-developed countries, adopted in Marrakesh, Morrocco on April 15, 1994;

(3) address, to the extent appropriate, the effects of the Uruguay Round agreements, particularly the Agreement on Agriculture, on Africa's ability to export and to meet its food needs through imports;

(4) foster economic development in Africa through increased trade and sustained economic reforms; and

(5) strengthen protection of intellectual property rights in Africa.

Finally, the Committee expects that the President will direct the ITC to prepare, within twelve months of the date of enactment of H.R. 5110, and annually for four years thereafter, reports, which will be provided to the President and to the House Committee on Ways and Means and to the Senate Committee on Finance, and which should contain—

(1) an analysis of U.S.-Africa trade flows; and

(2) an assessment of the effect of the Uruguay Round agreements, and of U.S. trade and development policy for Africa, on such trade flows.

Reasons for change

The Committee agrees with the Administration that the development and implementation of a comprehensive Africa trade and development policy is in the economic and national-security interests of the United States. Also, the Committee recognizes that the liberalization of trade, particularly trade in agricultural commodities, under the Uruguay Round agreements, is likely to have a significant effect on African countries' ability to export and to meet food needs through imports.

Section 135. Objectives for extended negotiations

Present law

No provision.

Exploration of provision

Section 135 of H.R. 5110 set forth principal U.S. negotiating objectives for the extended negotiations to be conducted in the WTO on financial services, basic telecommunications, and on trade in civil aircraft.

Reasons for change

The General Agreement on Trade in Services (GATS) negotiated as part of the Uruguay Round, and related Ministerial decisions, provide for continuing negotiations after the WTO enters into force with respect to certain services sectors, including financial services and basic telecommunications services. Moreover, it is expected that multilateral efforts will continue in the WTO to improve the Agreement on Trade in Civil Aircraft, which was first negotiated in the Tokyo Round, and will be administered in the future within the framework of the new WTO.

These three sectors are important and globally competitive sectors of the U.S. economy that are all poised to increase their current share of world markets if the world trading system is further liberalized in these areas. For that reason, the Committee strongly supports the objectives for extended negotiations set forth in section 135. These objectives reflect a national consensus that should guide U.S. negotiators in future negotiations.

With respect to *financial services,* the Committee believes that obtaining market access and national treatment commitments abroad for U.S. financial services providers is essential to the future international expansion of U.S. financial services. In the absence of receiving such commitments, the United States should not undertake commitments in the GATS to provide national treatment of MFN treatment in the United States for foreign financial services providers.

As for *basic telecommunications services,* the Committee is encouraged that substantial progress was made in the Uruguay Round on enhanced telecommunications services. However, the United States is a world leader in the efficient provision of basic telecommunications services. The Committee believes that U.S. negotiators must strive to obtain the opening on nondiscriminatory terms and conditions of foreign markets for basic telecommunications services through facilities-based competition or through the resale of services on existing networks.

Regarding *trade in civil aircraft,* the United States is the world's leading producer and exporter of civil aircraft. In recent years, however, the U.S. position has been eroded because of reduced market access and unfair trade practices by a number of our trading partners. Consequently, it is imperative for the United States to redouble its negotiating efforts to obtain competitive opportunities for U.S. exporters in foreign markets substantially equivalent to those afforded to foreign products in the U.S. market; to reduce specific tariff and nontariff barriers, including through expanded membership by developing country civil aircraft producers in the Agreement on Trade in Civil Aircraft and the U.S.–EC bilateral agreement on large civil aircraft; to ensure compliance with the new WTO disciplines on subsidies and to improve transparency of such subsidies; and to follow the approach for indirect subsidies set forth in the U.S.–EC bilateral agreement on large civil aircraft.

Section 136. Repeal of tax on imported perfumes; drawback of tax on distilled spirits used in perfume manufacture

Present law

A $13.50 per wine gallon excise tax is imposed on imported perfumes that contain distilled spirits. (Code sec. 5001(a)(3)) The tax on other distilled spirits is imposed at a rate of $13.50 per proof gallon. (A proof gallon is a liquid gallon consisting of 50 percent alcohol; a wine gallon is a liquid gallon.)

Explanation of provision

Section 136 of H.R., 5110 repeals the excise tax on imported perfumes containing distilled spirits.

Reasons for change

Under GATT 1947, the tax on imported perfume containing distilled spirits was exempted from GATT national treatment requirements under a "grandfather" provision in the GATT Protocol of Provisional Application. The grandfather clause will not be included in the GATT 1994, thus requiring repeal of the tax on imported perfume.

Section 137. Certain nonrubber footwear

Present law

There are currently four lawsuits pending in U.S. courts that address issues relating to certain entries of nonrubber footwear from Brazil.

Explanation of provision

Section 137 of H.R. 5110 provides that nonrubber footwear from Brazil, subject to Treasury Decision 74–233 (September 9, 1974), that was entered, or withdrawn from warehouse, for consumption on or before October 28, 1981, and for which entries are unliquidated as of the date of enactment of the Uruguay Round Agreements Act, will be assessed countervailing duties (CVDs) at rates equal to the cash deposit of estimated CVDs required on such footwear at the time of entry or withdrawal from warehouse for consumption. Interest on underpayments of amounts required to be deposited as CVDs will be paid in accordance with section 778 of the Tariff Act of 1930 (19 U.S.C. 1677g).

Reasons for change

The change would resolve outstanding GATT 1947 dispute settlement panel reports concerning certain entries of nonrubber footwear from Brazil.

Section 138. Effective date

Subtitle D and the amendments made by the subtitle take effect on date of enactment, except sections 132 and 135, which take effect on the date the WTO Agreement enters into force for the United States, and section 136.

TITLE II—ANTIDUMPING AND COUNTERVAILING DUTY PROVISIONS

SUBTITLE A—GENERAL PROVISIONS

Section 211. Action with respect to petitions

NOTE.—Many of the amendments discussed in this section and in sections 212, 213, 228, and 231 of H.R. 5110, as well as at Part C of the Statement of Administrative Action reflect the achievement of one of the United States' principal negotiating objectives in the Uruguay Round antidumping and subsidies-countervailing duty negotiations—to strengthen the procedural safeguards in antidumping and countervailing duty proceedings. In recent years, an increasing number of countries have begun to adopt and apply antidumping and countervailing duty laws.

To protect U.S. exporters from arbitrary actions by foreign antidumping and countervailing duty authorities, the United States negotiated procedural and evidentiary safeguards consistent with U.S. standards of transparency and procedural fairness. These procedural and evidentiary improvements in the Agreements help to ensure that U.S. exporters will be able to defend their interests in foreign antidumping and countervailing duty proceedings.

Most of the statutory amendments concerning antidumping and countervailing duty procedural and evidentiary requirements codify existing practices of Commerce and the Commission. Nevertheless, the Committee believes that it is important to reflect, in the statute itself or in regulations, the standards of the Agreements relating to transparency and procedural fairness. References to sections of existing U.S. law, unless otherwise specified, are to the Tariff Act of 1930 (the Act). References to "the Agreements" are to the Agreement on Implementation of Article VI (Antidumping Agreement or Agreement) and to the Agreement on Subsidies and Countervailing Measures.

Present law

There is no comparable provision of current U.S. law, which provides simply for the commencement of an investigation upon filing of a petition.

Explanation of provision

Sections 211 and 212 of H.R. 5110 amend sections 702 and 732 of the Act to reflect some of the Agreements' other requirements for antidumping and countervailing duty petitions. Sections 211 of H.R. 5110 adds new sections 702(b)(4) and 732(b)(3) to the Act to specify the actions Commerce and the Commission will take to avoid publicizing the existence of a petition before the initiation of an investigation.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Section 212. Petition and preliminary determination

Evaluation of Petition

Present law

Current U.S. law, sections 702(a) (with respect to countervailing duty (CVD) investigations), and 732(a) (with respect to antidumping investigations), require that Commerce initiate an investigation whenever it determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a CVD or antidumping duty, respectively, exist. Section 702(c) and 732(c) provide that Commerce determine whether the petition alleges the elements necessary for the imposition of an antidumping or countervailing duty and contains information reasonably available to the petitioner supporting the allegations.

Explanation of provision

Section 212(a) creates new sections 702(d)(1)(A)(i) and 732(c)(1)(A)(i) to reflect the requirements of the Agreements that Commerce examine the accuracy and adequacy of the evidence provided in a petition to determine whether the evidence is sufficient to justify initiation of an investigation. This amendment largely codifies existing Commerce practice, and the Committee believes that the amendment is consistent with the standards articulated in the legislative history of the trade Agreements Act of 1979. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 47, 63 (1979); H. Rep. No. 317, 96th Cong., 1st Sess. 51, 59–60 (1979).

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Industry Support for a Petition

Present law

Sections 702(b)(1) and 732(b)(1) of the Act require that a petition be filed "on behalf of" an industry. Section 771(4)(B) further provides that "[w]hen some producers are related to the exporters or importers, or are themselves importers of the allegedly dumped or subsidized merchandise, the term "industry" may be applied in appropriate circumstances by excluding such producers from those included in that industry."

Explanation of provision

Section 212 of H.R. 5110 amends sections 702(c) and 732(c) of the Act to provide that, as a general rule, Commerce should not include as members of the domestic industry those domestic producers who oppose the petition, but are related to exporters, in determining the level of support within the domestic industry for the petition, unless such producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an order.

Amended sections 702(c)(4)(B)(ii) and 732(c)(4)(B)(ii) of the Act also provide that, as under current practice, Commerce will not apply a bright line test to determine whether a producer who is an importer of the subject merchandise or who is related to an importer of the subject merchandise should be excluded from the domestic industry. Instead, it will look to relevant factors, such as percentage of ownership or volume of imports. For example, the exclusion of a company that imports a small amount of subject merchandise, by comparison with its total production, will depend on whether that company and petitioners have a common stake in the investigation. See *Citrosuco Paulista, S.A.* v. *United States,* 704 F. Supp. 1075, 1085 (Ct. Int'l Trade 1988).

Section 212(a) of H.R. 5110 further amends sections 702(c) and 732(c) of the Act to implement the Agreements' requirements that

Commerce determine, prior to the initiation of an investigation, that a minimum percentage of the domestic industry supports an antidumping or countervailing duty petition. In implementing these requirements, the Administration has sought to minimize the burden on U.S. industry and to streamline the administrative process in a manner consistent with the Agreements. For example, the question of industry support will be resolved conclusively at the outset of a proceeding, thereby eliminating the burden on petitioners under current law of potentially rearguing this issue after initiation.

New sections 702(c)(1)(A) (ii) and 732(c)(1)(A)(ii) of the Act implement the requirement that Commerce determine that a petition is supported by the domestic industry before initiating an investigation. A petition is filed "by or on behalf of the industry" if: (1) domestic producers or workers who support the petition account for more than fifty percent of the production of that product produced by those members of the domestic industry expressing support for or opposition to the petition; and (2) those domestic producers or workers expressing support account for at least twenty-five percent of total domestic production of the domestic like product. Commerce normally will determine the existence of industry support based on the volume or value of production.

Under new sections 702(c)(4)(D) and 732(c)(4)(D) of the Act, if a petition provides sufficient evidence that domestic producers or workers accounting for more than fifty percent of total domestic production of the domestic like product expressly support the petition, Commerce will determine, on the basis of evidence contained in the petition, that the petition is filed "by or on behalf of the domestic industry."

If the requisite support is not established on the face of the petition, Commerce will poll or otherwise determine whether the industry supports the petition.

New sections 702(c)(4)(A) and 732(c)(4)(A) of the Act recognize that industry support for a petition may be expressed by either management or workers. The Committee intends that labor have equal voice with management in supporting or opposing the initiation of an investigation. Commerce's implementing regulations will make clear that in considering the views of labor, Commerce will count labor support or opposition as being equal to the production of the domestic like product of the firms in which the workers are employed. If workers are represented by a union, Commerce will count the production of those firms whose workers are represented by the union as being for or against the petition in accordance with the workers' position. If the management of a firm expresses a position in direct opposition to the views of the workers in that firm, Commerce will treat the production of that firm as representing neither support for nor opposition to the petition. As under current practice, the views of workers may be submitted by unions, other employee organizations, or *ad hoc* groups of workers.

New sections 702(c)(4)(C) and 732(c)(4)(C) of the Act establish a special rule for determining industry support if the petition is filed on behalf of a regional industry. In such situations, Commerce will apply the fifty and twenty-five percent domestic industry support requirements on the basis of production in the alleged region.

Thus, a petitioner need only show that domestic producers or workers in the relevant region, as opposed to the entire United States, support the petition.

The Committee expects that Commerce will initiate most cases within twenty days of the filing of a petition, as required under existing law. New sections 702(c)(1)(B) and 732(c)(1)(B) of the Act provide for an extension of up to twenty additional days after the filing of a petition in exceptional circumstances where Commerce cannot establish whether there is the requisite industry support within twenty days. The Committee expects that, in the vast majority of cases, the determination of industry support will be made within the initial twenty-day period.

Under existing law, the deadlines for making preliminary determinations run from the date on which a petition is filed. To allow Commerce and the Commission the same amount of time to make preliminary determinations as they have under existing law, the statutory deadlines in subsections (a), (b), and (c) of sections 703 and 733 may be extended if Commerce extends the deadline for an initiation determination, as described in the preceding paragraph. Additionally, to provide the Commission with sufficient time to prepare its opinions in preliminary investigations, section 212(b) of H.R. 5110 amends sections 703(f) and 733(f) of the Act to permit the Commission to transmit its opinion to Commerce not more than five working days after the date on which its preliminary determination is required to be made.

New sections 702(c)(4)(E) and 732(c)(4)(E) of the Act change current practice by precluding reconsideration of support for a petition after the initiation of an investigation.

Section 213. De minimis dumping margins

Present law

Under existing Commerce Department regulations, 19 C.F.R. 353.6, Commerce will disregard any weighted-average dumping margin that is less than 0.5 percent ad valorem, or the equivalent specific rate. This provision is not contained in statute.

Explanation of provision

In conformity with Article 5.8 of the Antidumping Agreement, section 213 of H.R. 5110 amends sections 733(b) and 735(a) of the Act to require that, in antidumping investigations, Commerce treat the weighted-average dumping margin of any producer or exporter which is below two percent ad valorem as de minimis. Exporters or producers with de minimis margins will be excluded from any affirmative determination.

This requirement applies only to investigations and does not apply to reviews of orders or agreements. The Committee intends that Commerce will continue its present practice in reviews of waiving the collection of estimated cash deposits if the deposit rate is below 0.5 percent ad valorem, the existing regulatory standard for de minimis.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 214. Critical circumstances

Present law

Under current law, critical circumstances exist if Commerce determines that: (1) there have been massive imports of the subject merchandise over a relatively short period of time (i.e. a surge of imports) prior to the suspension of liquidation; and (2) in countervailing duty investigations, the subsidy is inconsistent with the Agreement, or in antidumping investigations, there is either a history of dumping or the importer knew or should have known that the exporter was selling the merchandise at less than fair value.

If Commerce determines that critical circumstances exist, then the Commission determines whether retroactive duties are necessary to prevent recurrence of material injury. In making this determination, the Commission is required to evaluate whether the effectiveness of the order would be materially impaired if retroactive duties were not imposed. If both agencies make affirmative determinations in their final investigations, retroactive duties will be applied for a period of ninety days prior to suspension of liquidation.

Explanation of provision

Section 214 of H.R. 5110 amends sections 703, 705, 733, and 735 of the Act to incorporate the new provisions of the Antidumping Agreement relating to critical circumstances determinations and the assessment of retroactive duties. To preserve the parallel structure in U.S. law, conforming changes are also made in the countervailing duty provisions.

For antidumping investigations, section 735(a)(3)(A) of the Act is amended to require that Commerce determine whether there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere or whether the importer knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales.

With regard to Commission determinations, H.R. 5510 clarifies that the Commission is to determine whether the surge in imports prior to the suspension of liquidation, rather than the failure to provide retroactive relief, is likely to seriously undermine the remedial effect of the order. Consistent with Commission practice and judicial precedent, the Commission is not required to make a separate material injury determination regarding the surge in imports. *ICC Industries, Inc.* v. *United States,* 632 F. Supp. 36, 40 (Ct. Int'l Trade 1986).

Sections 214(a)(2)(B) and (b)(2)(B) of H.R. 5110 amend sections 705(b)(4)(A) 735(b)(4)(A) of the Act to eliminate the existing references to "recurrence of material injury." This term is used in the changed circumstances and five-year review provisions and could be misinterpreted to imply similarities between critical circumstances and those other two different inquiries.

Section 214(a)(2)(b) of H.R. 5110 also eliminates the reference in section 705(b)(4)(A) of the Act to "injury which is difficult to repair" to conform to the new language in the antidumping provision concerning the Commission determination regarding a surge in imports. This deleted language is unnecessary and redundant.

Sections 214(a)(2)(B) and (b)(2)(B) of H.R. 5110 also amend the current list of factors in sections 705(b)(4)(A)(iii) and 735(b)(4)(A)(iii) of the Act that the Commission considers in making its final critical circumstances determination. The new factors track the language of the Agreement, and essentially are reformulations of many of the factors in the current statute. The new list is not exclusive. The factors provided in existing statute, even though not specifically mentioned in H.R. 5110, may be relevant in particular investigations.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 215. Provisional measures

Present law

Sections 702(d)(1) and 732(d)(1) of the Act provides that Commerce shall order the suspension of liquidation of all entries of the products subject to investigation on or after the date of publication of Commerce's preliminary determination. U.S. statute does not contain a minimum period of time after initiation before which the provisional measures may take effect nor a maximum time such measures may remain in effect.

Explanation of provision

Section 215 of H.R. 5110 amends existing sections 703(d) and 733(d) of the Act to reflect the provisions in the Agreements concerning the imposition of provisional measures, including the prohibition on imposing provisional measures less than sixty days after the initiation of an investigation. The amendments do not require any change to existing U.S. practice.

Amended sections 703(d)(1) and 733(d)(2) of the Act implement the Agreements' provisions limiting the duration of provisional measures to four months. In antidumping investigations, Commerce may extend the period to six months if exporters representing a significant portion of exports of the subject merchandise so request. The amendments do not affect the ability of the United States to impose duties retroactively where critical circumstances exist.

Section 215(a)(2) of H.R. 5110 amends sections 703(e)(2) and 733(e)(2) of the Act to implement the requirement in Article 10.8 of the Agreement that duties not be assessed pursuant to a finding of critical circumstances on entries made prior to the initiation of an antidumping duty investigation. Although this requirement is not reflected in the Subsidies Agreement, it is consistent with current countervailing duty practice.

Reasons for change

The changes are made to conform U.S. law more specifically to the provisions of the Agreements.

Section 216. Conditions on acceptance of suspension agreements

Present law

Sections 704(e) and 734(e) of the Act require that Commerce take various steps to notify the petitioner and other interested parties of its intention to suspend an investigation and permit comment thereon.

Explanation of provision

Section 216 of H.R. 5110 amends sections 704(d) and 734(d) of the Act to provide that, if a suspension agreement is rejected, Commerce will: (1) upon request and where practicable, provide the reasons for rejecting the agreement; and (2) where possible, provide exporters with the opportunity to submit comments thereon.

Reasons for change

The changes to U.S. law are made to implement new procedural requirements in the Agreements.

Section 217. Termination of investigation

Present law

There is no comparable provision in current U.S. statute.

Explanation of provision

Section 217 of H.R. 5110 amends sections 704(a)(1) and 734(a)(1) of the Act to provide that if, within three months after a petitioner withdraws petition, a new petition is filed seeking the imposition of duties on both the subject merchandise of the withdrawn petition and the subject merchandise from another country, the Commission may use in the investigation initiated pursuant to the new petition any records compiled in the investigation conducted pursuant to the withdrawn petition. Section 217 further clarifies that the amended subparagraph applies only to the first withdrawal of a petition.

Reasons for change

The changes are made to ensure that the new "simultaneous initiation" requirement in U.S. statute for cumulation is not abused.

Section 218. Special rules for regional industries

Suspension agreements in regional industry investigations.—Exporters in regional industry investigations, as in other antidumping and countervailing duty investigations, have an opportunity to propose suspension agreements. In one circumstance, such exporters might be deprived of that opportunity: investigations in which the Commission does not find a regional industry until its final determination.

Assessment of Duties in Regional Industry Investigations.—Under current U.S. law, sections 706 and 736, duties in regional industry cases, as in national industry cases, are assessed on a national basis.

Explanation of provision

Section 218 of H.R. 5110 amends section 704 and 734 of the Act to implement the requirements of the Agreements regarding to the assessment of duties in regional industry investigations.

Suspension agreements in regional industry investigations.—Section 218 establishes new sections 704(l) and 734(m) of the Act to require Commerce, in those cases where the Commission determines that a regional industry exists, to provide exporters to the region concerned with an opportunity to enter into a suspension agreement, but only if they account for substantially all imports of the subject merchandise into the region.

Regional suspension agreements are subject to all of the requirements imposed under amended sections 704 and 734 of the Act for suspension agreements in general with one exception—investigations in which the Commission does not find a regional industry until its final determination. In that case, exporters to the region may enter into an agreement within sixty days after an antidumping or countervailing duty order has been issued. If Commerce accepts a suspension agreement, it will rescind the outstanding antidumping or countervailing duty order, refund any cash deposits, release any bond or other security deposited, and instruct the Customs Service to disregard the order and liquidate all entries of the subject merchandise made while the order was outstanding.

Assessment of duties in regional industry investigations.—Section 218 of H.R. 5110 amends sections 706(c) and 736(d) of the Act to provide Commerce with the authority in regional industry investigations to limit the assessment of duties to those exporters and/or producers that sold the subject merchandise for export to the region during the period of investigation. If the Commission finds injury to a regional industry, Commerce will, to the maximum extent possible, direct that the assessment of duties be limited to merchandise of the specific exporters or producers that exported dumped or subsidized merchandise for sale in the region during the period of investigation. These provisions exclude from the order, to the "maximum extent possible," those exporters or producers that did not export for sale in the region during the period of investigation.

New sections 706(c) and 736(d) of the Act also incorporate an exception for new shippers. If Commerce finds that, subsequent to the issuance of an antidumping or countervailing duty order in a regional industry case, an exporter or producer, who had not exported for sale in the region during the original period of investigation, begins to export subject merchandise for sale in the region, Commerce will direct that estimated duties be deposited on the subject merchandise of the new exporter or producer. Commerce may include merchandise in an order at any time it finds that merchandise from an exporter or producer not previously included in the order is being sold in the region in question. Under new section 751(a)(2)(B), the importer or exporter concerned may request an accelerated administrative review.

Reasons for change

The changes are made to conform U.S. law more specifically to the provisions of the Agreement.

Section 219. Determination of weighted average dumping margin

Present law

Under current U.S. law, in determining the all others rate, Commerce includes margins determined on the basis of the facts available and excludes margins that are *de minimis* or zero.

Explanation of provision

Section 219(b) of H.R. 5110 adds section 735(c)(5)(A) to the Act, implementing Article 9.4, to provide that the all others rate will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available.

Section 219(b) of H.R. 5110 also adds new section 735(c)(5)(B) to the Act to provide an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*. In such circumstances, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data are available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 220. Review of determinations

Time Limits

Present law

Current U.S. statute does not contain time limits for the completion of administrative reviews.

Explanation of provision

New section 751(a)(3)(A) of the Act establishes the time limits for completion of preliminary and final results of administrative reviews in which final duty liability is established. Consistent with existing Commerce regulations and Article 9.3.1 of the Antidumping Agreement, reviews normally will be completed within 365 days of initiation. This period may be extended up to a total of 545 days if it is not practicable to complete the review within the normal deadline.

New section 751(a)(3)(B) of the Act requires liquidation of entries following the completion of an administrative review, to the greatest extent practicable, within ninety days after the issuance of liquidation instructions to Customs. If liquidation does not occur within that period, the Secretary of the Treasury is required, upon request, to provide an explanation for the delay.

Section 220(c) of H.R. 5110 makes conforming changes to section 504 of the Act, a provision which establishes general rules regarding the liquidation of customs entries.

Reasons for change

The changes are made to conform U.S. law more specifically to the provisions of the Agreements.

New Shipper Reviews

Present law

Under existing practice, antidumping duty orders are applied on a country-wide basis. Thus, except for merchandise from firms that Commerce has determined to be selling at non-dumped prices, all merchandise from a country covered by an order is subject to potential liability for antidumping duties. This includes merchandise from new shippers.

Explanation of provision

Section 220(a) of H.R. 5110 implements article 9.5 of the Agreement by amending section 751(a)(2)(B) of the Act to require Commerce to initiate accelerated administrative reviews of new shippers, if requested to do so.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Changed Circumstances Reviews

Present law

Section 751(b) of the Act currently contains a lengthy list of determinations and agreements for which a changed circumstances review may be requested. The substantive standard under current U.S. law is whether "there are changed circumstances sufficient to warrant revocation."

Explanation of provision

Section 220(a) of H.R. 5110 simplifies the section 751(b) list by dividing it into three categories: (1) affirmative determinations resulting in an antidumping or countervailing duty order or an antidumping finding; (2) determinations regarding suspension agreements; and (3) final affirmative determinations resulting from an investigation continued following the entry into a suspension agreement.

Amended section 751(b) also applies a new substantive standard, which is consistent with current Commission practice. In the case of an antidumping or countervailing duty order or finding or a suspended investigation, the Commission must determine whether revocation of the order or finding, or termination of the suspended investigation, is likely to lead to continuation or recurrence of material injury. In reviewing the effectiveness of a suspension agreement, the Commission will determine whether the agreement, in light of the changed circumstances, continues to eliminate completely the injurious effects of imports of the subject merchandise.

Under amended section 751(b), the party seeking revocation continues to bear the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of an antidumping duty or countervailing duty order or an antidumping duty finding. The revised law imposes the same burden of persuasion on a party seeking termination of a suspended investigation or a suspension agreement.

Reasons for change

The changes are made to conform U.S. law more specifically to the provisions of the Agreement.

Five-Year ("Sunset") Reviews

Present law

Currently, there is no five-year review provision in U.S. statute.

Explanation of provision

Section 220(a) of H.R. 5110 adds new Section 751(c) to the Act establishing the procedural and basic substantive rules to be applied by Commerce and the Commission in conducting five-year reviews (*i.e.*, sunset reviews).

Automatic Reviews.—New section 751(c)(1) requires Commerce and the Commission to conduct a review no later than five years after the issuance of an antidumping duty order or finding or countervailing duty order, the suspension of an investigation, an injury determination in a countervailing duty proceeding under new section 753, or a changed circumstances or prior five-year review, to determine whether revocation of the order, or termination of the suspended investigation, would be likely to lead to continuation or recurrence of dumping or countervailable subsidies and injury. Commerce and the Commission will make their sunset determinations on an order-wide, rather than a company-specific, basis. New section 751(c)(1) provides for automatic initiation of five-year reviews by Commerce.

Participation in Five-year Reviews.—New section 751(c)(2) requires Commerce to publish a notice in the *Federal Register* requesting interested parties to submit a statement of interest and other information specified by Commerce and the Commission. New section 751(c)(3) is intended to eliminate needless reviews and promote administrative efficiency. Under new section 751(c)(3)(A), if there is no response from domestic interested parties to the notice of initiation, Commerce will revoke the order or terminate the suspended investigation within 90 days of the initiation of the review. Under new section 751(c)(3)(B), if there is inadequate response to a notice of initiation by foreign or domestic interested parties, Commerce and the Commission will conduct an expedited review based on the facts available.

Judicial Review Standards.—Section 220(b) of H.R. 5110 amends sections 516A(a)(1) and 516A(b)(1)(B) of the Act to apply the arbitrary and capricious standard of review in judicial or binational panel review of final determinations by Commerce and the Commission under section 751(c)(3). Determinations under section 751(c)(3) will be based on limited information in the record resulting from no response or inadequate response to the notice of initiation. Therefore, such determinations should not be subject to the substantial evidence standard of review. The substantial evidence standard will apply to final determinations under section 752 which are made on the basis of a fully developed record. This is consistent with the legislative history of the 1979 Act establishing two standards of review for certain antidumping and countervailing duty determinations: arbitrary and capricious for Commission preliminary negative determinations of injury and Commerce determinations not to initiate an investigation under section 751(b); and substantial evidence for determinations in final investigations and reviews. H. Rep. No. 317, 96th Cong., 1st Sess. 180 (1979). The amendment to section 516A(b)(1)(B) ensures that the same standard of review will apply to reviews in both courts and binational panels consistent with Article 1904 and Annex 1911 of the North American Free Trade Agreement.

Timing of Five-year Reviews and Waivers of Participation.—To reduce the burden on all parties involved, new section 751(c)(4) permits foreign interested parties, including foreign governments, to waive their participation in a Commerce sunset review. If Commerce receives such a waiver, Commerce will conclude that revocation or termination would be likely to lead to continuation or recurrence of dumping or countervailable subsidies with respect to the submitter. The Committee intends that in a countervailing duty case, where the foreign government waives its participation in the review; Commerce will conclude that countervailable subsidies are likely to continue or recur with respect to all foreign interested parties in that review.

New section 751(c)(5) establishes time limits for the completion of reviews that have not been completed pursuant to the expedited procedures of paragraphs (3) or (4) of section 751(c). Normally, Commerce will make its final sunset determination within 240 days of the initiation of the review. If Commerce's determination is affirmative, the Commission will make its final sunset determination within 360 days of the initiation of the review.

Under new section 751(c)(5)(C), Commerce or the Commission may declare a five-year proceeding to be extraordinarily complicated if the issues are large in number or complex, a large number of firms is involved, or the review involves grouped reviews or a transition order. If a review is extraordinarily complicated, each agency may extend the time limit for making its determination by not more than ninety days. If Commerce extends its time limit, but the Commission does not, the Commission shall make its final determination within 120 days of Commerce's final affirmative determination.

Grouped Five-year Reviews.—New section 751(c)(5)(D) permits the Commission, in consultation with Commerce, to group five-year reviews together if such grouping is appropriate and promotes administrative efficiency. The Commission may consolidate reviews involving antidumping and countervailing duty orders, findings, suspended investigations, or any combination thereof. The Commission should consolidate reviews involving the same domestic like product, and also may consolidate reviews involving related like products or identical or related producers.

Consolidating reviews will permit the simultaneous collection of information and the use of a single administrative record in making determinations. Because the grouping of reviews promotes administrative efficiency, the decision to consolidate reviews is committed to agency discretion. Under new section 751(c)(2), Commerce will initiate a five-year review no later than thirty days before the five-year anniversary date of the order or suspension agreement. Commerce normally will initiate a five-year review shortly before the thirty-day period begins. Upon request of the petitioner, however, Commerce may initiate a five-year review at an earlier date. This provides a mechanism for consolidating two or more reviews that ordinarily would not be considered at the same time. Such consolidation will minimize the burden on the domestic industry and promote efficient administration of the laws.

Five-year Reviews of Transition Orders.—New section 751(c)(6) establishes special rules for five-year reviews of antidumping duty and countervailing duty orders, findings, and suspended investigations that are deemed to be issued as of the date the WTO Agreement enters into force with respect to the United States. Because there likely will be more than 400 of these transition orders, special rules are necessary to enable the agencies to conduct five-year reviews within a reasonable period and in a manner consistent with the Agreements.

New section 751(c)(6)(A) establishes a schedule for completing five-year reviews of transition orders in a timely and efficient manner. Section 751(c)(6)(A)(ii) also provides that subsequent five-year reviews of transition orders will follow the same time frame as initial five-year reviews. New section 751(c)(6)(A)(iv) provides that Commerce will not revoke or terminate a transition order before the fifth anniversary of the date of the entry into force of the WTO with respect to the United States, unless the petitioner requests an accelerated review.

To promote administrative efficiency, new section 751(c)(6)(B) gives Commerce, in consultation with the Commission, discretion to determine the appropriate sequence of five-year reviews of transition orders. To the maximum extent practicable, the agencies will review older orders first.

Finally, section 220 replaces existing subsection 751(c) with subsection 751(d) which adds a new paragraph (2) regarding five-year reviews. Paragraph (2) provides that in a five-year review, Commerce will revoke an order or terminate a suspended investigation unless Commerce determines that dumping or countervailable subsidies would be likely to continue to recur, and the Commission determines that injury would be likely to continue or recur, in the event of revocation or termination.

Reasons for change

The changes described above are made to conform U.S. law to the obligations of the Agreements.

Expedited Investigations

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

New subsections 702(c)(1)(C) and 732(c)(1)(C) of the Act provide that the agencies will expedite, to the maximum extent practicable in light of procedural requirements, an investigation of a petition filed within two years of revocation of an order (or termination of a suspended investigation) involving imports of the same subject merchandise, notwithstanding the maximum time limits established by the statute for conduct of investigations. Expeditious conduct of investigations will be especially important following revocation or termination under the new sunset provisions required by the Agreements and implemented in section 751(c).

Reasons for change

The change is made to promote the expeditious conduct of investigations following the revocation of an order (or termination of a suspension agreement) following sunset or changed circumstances reviews.

Section 221. Standards for determining likelihood of continuation or recurrence of injury, countervailable subsidies, or dumping

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

Section 221(a) of H.R. 5110 adds new section 752 to the Act which establishes standards to be applied by Commerce and the Commission in conducting changed circumstances and five-year reviews. Specifically, section 752 elaborates on the standards for determining whether revocation of an order or termination of a suspended investigation would be likely to lead to a continuation or recurrence of injury, countervailable subsidies, or dumping.

The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case. In such situations, the order or suspended investigation will be continued.

Likelihood of Injury: General Rules.—Under the likelihood standard in new section 752(a)(1), the Commission must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation of an order or termination of a suspended investigation and the elimination of the restraining effects of that order or suspended investigation on volumes and prices of imports.

The likelihood of continuation or recurrence of material injury standards is not the same as the standards for material injury and threat of material injury, although it contains some of the same elements. Under the material injury standard, the Commission determines whether there is current material injury by reason of imports of subject merchandise. Under the threat of material injury standard, the Commission decides whether injury is imminent, given the status quo. By comparison, under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation or termination of a proceeding and the elimination of its restraining effects on volumes and prices of imports.

The likelihood of continuation or recurrence of material injury standard is prospective in nature, and, thus, a separate determination regarding current material injury is not necessary. Nonetheless, the Commission may consider relevant factors such as current and likely continued depressed shipment levels and current and likely continued prices for the domestic like product in the U.S. market in making its determination of the likelihood of continuation or recurrence of material injury if the order is revoked. In appropriate circumstances, the Commission may make an affirmative determination notwithstanding the lack of any likely further deterioration of the current condition of the domestic industry if revocation of the order, or termination of a suspended investigation, would be likely to lead to the continuation or recurrence of material injury.

Subparagraphs (A) through (D) of new section 752(a)(1) list the factors that the Commission must take into account in conducting a likelihood of injury analysis.

Under subparagraph (D), when an importer is affiliated with the exporter, dumping is measured by reference to the affiliated importer's resale price. However, it is the affiliated importer, not the unaffiliated U.S. purchaser of the dumped goods, who must pay the antidumping duty. Under certain circumstances, the affiliated importer may choose to pay the antidumping duty rather than eliminate the dumping, either through lowering prices in the foreign market, raising prices in the United States, or a combination of both.

During an administrative review initiated two or four years after the issuance of an order, Commerce will examine, if requested, whether absorption has taken place by reviewing data on the volume of dumped imports and dumping margins. Duty absorption is a strong indicator that the current dumping margins calculated by Commerce in reviews may not be indicative of the margins that would exist in the absence of an order. Once an order is revoked, the importer could achieve the same pre-revocation return on its sales by lowering its prices in the U.S. in the amount of the duty that previously was being absorbed. The duty absorption inquiry would not affect the calculation of margins in administrative reviews. This new provision of law is not intended to provide for the treatment of antidumping duties as a cost.

An affirmative finding of absorption in an administrative review initiated two years after the issuance of an order is intended to have a deterrent effect on continued absorption of duties by affiliated importers; if they engage in duty absorption, they will know that they will face an additional hurdle that will make it more difficult to obtain revocation or termination. If, in the four-year review, Commerce finds that absorption has taken place, it will take that into account in its determination regarding the dumping margins likely to prevail if an order were revoked.

Commerce will inform the Commission of its findings regarding duty absorption, and the Commission will take such findings into account in determining whether injury is likely to continue or recur if an order were revoked. Duty absorption may indicate that the producer or exporter would be able to market more aggressively should the order be revoked as a result of a sunset review. Thus, the Commission is to consider duty absorption in determining whether material injury is likely to continue or recur.

Also, Commerce has full authority under its current regulations (19 CFR 353.26) to increase the duty when an exporter directly pays the duties due, or reimburses the importer, whether independent or affiliated, for the importer's payment of duties. Commerce intends no change in its practice in this area, which is to instruct Customs to double the duties if the importer fails to furnish a certificate of non-reimbursement to Customs prior to liquidation of entries.

Likelihood of injury: Volume, Price, and Impact of Imports.—Paragraphs (2), (3), and (4) of new section 752(a) adapt the standard volume, price effect, and impact factors contained in the Agreements for normal injury analysis to likelihood of injury analysis. Thus, in five-year and changed circumstances reviews, the Commission is required to consider the likely volume of imports, the likely price effects of imports, and the likely impact of imports on the domestic industry if the order were revoked or the suspended investigation terminated. In addition, specific factors applied by the Commission in its threat of injury analysis have been adapted for purposes of determining the likely volume, price and impact of subject imports in the event of revocation or termination.

Basis for Determination.—New section 752(a)(5) establishes the basis for making a likelihood of continuance or recurrence of material injury determination. As in the case of injury and threat determinations, the Commission must consider all factors, but no one factor is necessarily dispositive. In particular, the Commission need not determine that both the volume and price effects of imports are likely to be significant to determine that material injury is likely within a reasonably foreseeable time. Consistent with its practice in investigations, in considering the likely price effects of imports in the event of revocation or termination, the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices.

A "reasonably foreseeable time" will vary from case-to-case, but normally will exceed the "imminent" timeframe applicable in a threat of injury analysis. New section 752(a)(5) expressly states that the effects of revocation or termination may manifest themselves only over a longer period of time. The Commission will consider in this regard such factors as the fungibility or differentiation within the product in question, the level of substitutability between the imported and domestic products, the channels of distribution used, the methods of contracting (such as spot sales or long-term contracts), and lead times for delivery of goods, as well as other factors that may only manifest themselves in the longer term, such as planned investment and the shifting of product facilities.

Likelihood of injury: Magnitude of the Dumping Margin or Net Countervailable Subsidy.—New section 752(a)(6) permits the Commission to consider the magnitude of the dumping margin or net countervailable subsidy in determining the likely continuation or recurrence of injury. In a countervailing duty case, the Commission also will consider whether a subsidy is a prohibited subsidy or a subsidy for which serious prejudice may be presumed pursuant to the Subsidies Agreement. Because Commerce has the expertise regarding the identification and measurement of dumping and countervailable subsidies, new sections 752(b)(3) and 752(c)(3) require Commerce to provide the Commission with the dumping margins or net countervailable subsidies that are likely to prevail in the event of revocation or termination. The Commission shall not itself calculate or otherwise determine likely dumping margins or net countervailable subsidies or the nature of the subsidies in question.

Likelihood of injury: Cumulative Analysis.—New section 752(a)(7) grants the Commission discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports likely would compete with one another and with the domestic like product in the United States market. The statute provides that the Commission may cumulate imports from countries that were not originally investigated together if the conditions for cumulation in section 752(a)(7) are otherwise satisfied. The Commission shall not cumulate imports from any country if those imports are likely to have no discernable adverse impact on the domestic industry.

Likelihood of injury: Regional Industry Investigations.—For investigations involving a regional industry, new section 752(a)(8) provides that the Commission is not bound by any determination it may have made in the original investigation regarding the existence of a regional industry. If there is sufficient evidence to warrant revisiting the original regional industry determination, the Commission may base its likelihood determination on: (1) the regional industry defined by the Commission in the original investigation; (2) another regional industry satisfying the criteria of amended section 771(4)(C); or (3) the United States industry as a whole.

Given the predictive nature of a likelihood of injury analysis, the Commission's analysis in regional industry investigations will be subject to no greater degree of certainty than in a review involving a national industry. Because the issuance of an order or the acceptance of a suspension agreement may have affected the marketing and distribution patterns of the product in question, the Commission's analysis of a regional industry should take into account whether the market isolation and import concentration criteria in section 771(4)(C) are likely to be satisfied in the event of revocation or termination. Neither the Commission nor interested parties will be required to demonstrate that the regional industry criteria currently are satisfied. The Commission should take into account any prior regional industry definition, whether the product at issue has characteristics that naturally lead to the formation of regional markets (*e.g.*, whether it has a low value-to-weight ratio and is fungible), and whether any changes in the isolation of the region or in import concentration are related to the imposition of the order or the acceptance of a suspension agreement.

Likelihood of Countervailable Subsidies.—Section 221 of H.R. 5110 adds section 752(b) to the Act which establishes standards to be applied by Commerce in determining the likelihood of continuation or recurrence of countervailable subsidies. Under new section 752(b)(1), Commerce first will consider the net countervailable subsidies in effect after the issuance of the order and whether the relevant subsidy programs have been continued, modified, or eliminated.

New section 752(b)(2)(B) of the Act provides that, for good cause shown, Commerce also may consider allegations of new countervailable subsidies, but only to the extent that it determines such programs to be countervailable with respect to the exporters or producers subject to the review.

Under new section 752(b)(4), the existence of a zero or de minimis countervailable subsidy at any time while the order was in effect shall not in itself require Commerce to determine that continuation or recurrence of countervailable subsides is not likely. However, if the combined benefits of all programs considered by Commerce for purposes of its likelihood determination have never been above de minimis at any time the order was in effect, and if there is no likelihood that the combined benefits of such programs would be above de minimis in the event of revocation or termination, Commerce should determine that there is no likelihood of continuation or recurrence of countervailable subsidies.

Likelihood of Dumping.—Section 221 of H.R. 5110 adds section 752(c) of the Act which establishes standards for determining the likelihood of continuation or recurrence of dumping. Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.

The Committee believes that existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping.

New section 752(c)(2) of the Act provides that, for good cause shown, Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant.

Under new section 752(c)(4), the existence of zero or de minimis dumping margins at any time while the order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order or suspension agreement. Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order or agreement.

Provision to the Commission of Dumping Margins and Net Countervailable Subsidies.—The Commission may consider likely dumping margins or net countervailable subsidies to be relevant to its analysis of the likelihood of injury. Section 221 of H.R. 5110 adds sections 752(b)(3) and 752(c)(3) which direct Commerce to provide the Commission with the net countervailable subsidies and the magnitude of the margin of dumping that are likely to prevail in the event of revocation or termination. Commerce normally will select dumping margins or net countervailable subsidies determined in the original investigation or in a prior review. The Committee intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order or suspension agreement in place. In certain instances, a more recently calculated rate may be more appropriate. For example, if dumping margins have declined over the life of an order and imports have remained steady or increased, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent review.

In providing information to the Commission, the Committee does not intend that Commerce calculate future dumping margins or net countervailable subsidies, because such an exercise would involve undue speculation regarding future selling prices, costs of production, selling expenses, exchange rates, and sales and production volumes. Only under the most extraordinary circumstances should Commerce rely on dumping margins or net countervailable subsidies other than those it calculated and published in its prior determinations.

Reasons for change

The changes described above to U.S. law are made to conform it to the Agreements.

Section 222. Definitions

NOTE.—Various sections of Title II of U.R. 5110 change the nomenclature of the existing statute to conform to the terminology used in the Agreement or Agreements. The term "export price" replaces the term "purchase price," and "constructed export price" replaces the term "exporter's sales price." "Normal value" replaces the term "foreign market value." Because the Agreements use the term "like product" to refer to both foreign and domestic merchandise, the term "foreign like product" is substituted for "such or similar merchandise," and the term "domestic like product" is substituted for the term "like product." What formerly was referred to as the "class or kind" of merchandise subject to investigation or covered by an order is now referred to simply as the "subject merchandise." No substantive changes to U.S. law are intended simply by virtue of such changes in nomenclature to conform U.S. law to the terminology of the Agreements.

Section 222(a). Industry

Present law

Related parties.—Under section 771(4)(B) of the Act, the term "related parties" is defined as follows: "When some producers are related to exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term "industry" may be applied in appropriate circumstances by excluding such producers from those included in that industry.

Regional industry.—Under section 771(4)(C), the term "regional industries" describes the circumstances in which the Commission may find injury, threat of injury or material retardation to a regional—rather than a national—industry.

Import concentration in regional industry investigations.—Section 771(4)(C) provides that the Commission may find injury to a regional industry if, inter alia, "there is a concentration of subsidized or dumped imports into such an isolated market."

Explanation of Provision

Related parties.—Section 222(a) of H.R. 5110 amends section 771(4)(B) of the Act to implement the Agreements' definition of a "related" domestic producer. The new definition focuses on control between a domestic producer and an exporter or importer, whether the control is direct, indirect, or through a third party.

Control is defined as the ability of one party to legally or operationally exercise restraint or direction over another party. Although there is no precise statutory definition of the term importer, Commerce and the Commission will apply a sufficiently broad definition to encompass domestic producers who are not formally importers of record.

This definition of related parties is consistent with current Commission practice of considering certain specified factors as evidence of a relationship. The Committee does not expect that the amendments to section 771(4)(B) will cause a significant change in practice. Both Commerce and the Commission will have discretion in applying the related party provision to determine whether a producer is related and whether appropriate circumstances exist for excluding such a related producer from the domestic industry.

Regional industry definition.—Section 222(a)(2) of H.R. 5110 adds an explicit definition at 771(4)(C) of the Act for regional industry. As under current practice, a regional industry means the domestic producers within the region concerned and the Commission's regional industry analysis will be limited to consideration of the production facilities within a region.

Import concentration in regional industry investigations.—Concentration will be found to exist if the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market and if such imports into the region account for a substantial proportion of total subject imports entering the United States. In this regard, there is no "benchmark" proportion of imports that enter the region relative to imports that enter the United States, either eighty percent or any other percentage, which is applicable in every case, and below which the Commission cannot determine that imports are concentrated. *Mitsubishi Materials Corp.* v. *United States,* 820 F. Supp. 608, 614–615 (Ct. Int'l Trade 1993). Rather, concentration should be assessed on a case-by-case basis, and no "precise mathematical formula [is] reliable in determining the minimum percentage which constitutes sufficient concentration because cases before the Commission are likely to involve different factual circumstances." Id. (quoting *Certain Steel Wire Nails from the Republic of Korea,* Inv. No. 731–TA–26 (Final), USITC Pub. 1088 (Aug. 1980) at 11 (citations omitted)).

Interim Processors.—With respect to imports of dumped or subsidized processed agricultural products, domestic growers and interim processors of agricultural commodities might be damaged by imports of the processed products, even though the domestic processors themselves may not be adversely affected. The U.S. Trade Representative will, in consultation with appropriate agencies, review remedies permitted to growers and interim processors of agricultural products under the WTO, and, if appropriate, propose legislation to make available to growers and interim processors remedies for dumped and subsidized imports of processed products.

Reasons for change

Related parties.—The change is made to conform U.S. law to the Agreements.

Regional industry definition.—The Agreements do not alter existing criteria regarding the identification of a regional industry. Accordingly, no substantive change is intended. U.S. law is amended for the purpose of including an actual definition of "regional industry." along with the prior "regional industries" provision.

Regional industry concentration.—A provision clarifying this aspect of U.S. law is included in the Statement of Administrative Action. No change is made to statute.

Interim processors.—A provision requiring the Office of the U.S. Trade Representative to review existing remedies is included in the Statement of Administrative Action. No change is made to statute.

Section 222(b). Impact on affected domestic industry

Consideration of the Dumping Margin

Present law

Under current law, the Commission is neither required to nor prevented from considering the margin of dumping in its analysis of material injury by reason of imports. See *Copperweld Corp.* v. *United States,* 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988).

Explanation of provision

Section 222(b)(1)(B) of H.R. 5110 amends section 771(7)(C)(iii) of the Act by adding the magnitude of the margin of dumping to the list of factors the Commission considers in determining the impact of imports of subject merchandise on domestic producers of like products. There is no similar provision in the Subsidies Agreement and, as under current practice, the Commission will not be required to consider the rate of subsidization. (See e.g., *Copperweld Corp.* v. *United States,* 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988); *Alberta Pork Marketing Board* v. *United States,* 669 F. Supp. 445, 465 (Ct. Int'l Trade 1988).) This amendment does not alter the requirement in current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis.

Reasons for change

The amendment is necessary to conform U.S. law to the Agreement.

Causation

Present law

Under current U.S. law, the Commission is required to find injury, threat of injury or material retardation *by reason of* imports subject to investigation.

Explanation of provision

Article 3.5 of the Antidumping Agreement and 15.5 of the Subsidies Agreement do not change the causation standard from that provided in the 1979 Tokyo Round Codes. Existing U.S. law and legislative history fully implement the causation standard of the 1979 Codes. Thus, existing U.S. law fully implements Articles 3.5 and 15.5. Articles 3.5 and 15.5 do include new language requiring WTO signatories to "examine all relevant evidence" including "any known factors, other than the dumped [or subsidized] imports which at the same time are injuring the domestic industry." The obligations embodied in the new language are reflected in the existing statute and legislative history.

The GATT 1947 Panel Reports in the Norwegian Salmon cases approved U.S. practice as consistent with the 1979 Codes. The panel noted that the Commission need not isolate the injury caused by other factors from injury caused by unfair imports. See GATT Committee on Anti-dumping Practices, United States—Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway: Report on the Panel Par. 555 (Nov. 30, 1992); GATT Committee on Subsidies and Countervailing Measures, United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway: Report on the Panel Par. 321 (Dec. 4, 1992). Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.

Reasons for change

The provision described above is included in the Statement of Administrative Act with respect to the application of the Commission's causation standard. No change is made to statute.

Captive Production

Present law

Under section 771(7)(C)(iii) of the Act, the Commission evaluates the relevant economic factors within the context of the business cycle and the conditions of competition that are distinctive to the affected industry. Among the factors that the Commission must evaluate in determining whether a domestic industry is materially injured by reason of unfairly-traded imports are penetration of the U.S. market by those imports and the financial performance of the U.S. producers included in the industry.

Explanation of provision

Section 222(b)(2) of H.R. 5110 adds section 771(7)(C)(iv) to the Act to amend current law with respect to import penetration and financial performance to address situations in which vertically-integrated U.S. producers sell a significant volume of their production of the domestic like product to U.S. customers (i.e., the merchant market) and internally transfer a significant volume of their production of that same like product for further internal processing into a distinct downstream article (i.e., captive production). No conforming changes to the other provisions of the Tariff Act of 1930, as amended, are necessary.

If the captive production provision applies, the Commission will focus primarily on the merchant market in analyzing the market share and financial performance of the domestic industry. The provision does not require the Commission to focus exclusively on the merchant market in its analysis of market share and financial performance. The basis for this analysis is the recognition that, in such a captive production situation, the imports compete primarily with sales of the domestic like product in the merchant market, not with the inventory internally-transferred for processing into a separate downstream article. This provision is consistent with the Antidumping and Subsidies Agreements.

Captive production refers to production of the domestic like product that is not sold in the merchant market and that is processed into a higher-valued downstream article by the same producer. Selling in the merchant market refers to sales of the domestic like product to unrelated customers. A downstream article is an article distinct from the domestic like product but is produced from that product. (It is not necessarily a "downstream product" within the meaning of section 780(d)). The Commission will determine on a case-by-case basis whether the volume sold in the merchant market and internally transferred is significant. Captive production and merchant sales are significant if they are of such magnitude that a more focused analysis of market share and financial performance is needed for the Commission to obtain a complete picture of the competitive impact of imports on the domestic industry.

The captive production provision is applicable if the Commission, in addition to finding that the volumes of the domestic like product sold in the merchant market and transferred internally for processing into a distinct downstream article are significant, also finds that: (1) the production of the domestic like product internally transferred for further processing into a separate downstream article does not enter the merchant market for the upstream like product; (2) the domestic like product is the predominant material input used in the production of that separate downstream article; and (3) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article.

Under the second factor, the domestic like product will be considered "predominant" only where it is the primary material used in the production of a downstream article. Under the third factor, the production of the domestic like product sold in the merchant market will be considered "generally used in the production of that downstream article" if a significant portion of the production that enters the merchant market is actually processed into the same downstream article as that produced from the internally-transferred captive production. Whether the domestic like product sold in the merchant market is physically capable of being processed into the same downstream article (or some other downstream articles) is not relevant. Rather, the Commission should consider whether the production sold in the merchant market is actually used in the production of the same downstream article.

In cases in which this captive production provision applies, the Commission shall determine the extent to which the imports of the subject merchandise by a related party are sold in the merchant market or captively consumed by the related-party importer in the production of a downstream article. Imports which are sold in the merchant market shall be included in the import penetration ratio for the merchant market. Imports which are captively consumed by the related-party importer for processing into a downstream article shall be included in the import penetration ratio for the merchant market only if the imports compete with sales of the domestic like product. If such imports do not compete with sales of the domestic upstream like product in the merchant market, the Commission shall include such imports in the total import share of the industry's total production, but not in the import penetration ratio for the merchant market or in any other calculation in which captive domestic production is excluded.

This captive production analysis has no effect on the Commission's like product analysis. The Commission's discretion, in appropriate circumstances, to find that upstream and downstream articles constitute a single like product, and that integrated producers participate in a single industry, is unchanged. In such circumstances, the captive production provision would have no application.

Reasons for change

The change is made to clarify U.S. law on this issue.

Section 222(c). Determination of threat of injury

Present law

Section 771(7)(F)(i) of the Act contains ten factors for the Commission to consider, among other relevant economic factors, in reaching a determination of threat of material injury by reason of dumped or subsidized imports.

Explanation of provision

Section 222(c) of H.R. 5110 amends the list of specific factors in section 771(7)(F)(i) of the Act. Amended section 771(7)(F)(i) generally adopts the language of the Agreements for those factors included in both Agreements and the existing U.S. law. No substantive change in Commission threat analysis is required.

Amended section 771(7)(F) retains factors currently specified in the statute but not listed in the Agreements such as factors I, VII, VIII, IX, and X involving consideration of export subsidies, product shifting, raw and processed agricultural products, actual and potential negative effects on existing development and production efforts, and any other demonstrable adverse trends. The consideration of such additional factors is fully consistent with Articles 3.7 and 15.7 of the Antidumping and Subsidies Agreements which provide nonexhaustive lists of factors to consider in threat determinations.

Minor changes are made to clarify factors VIII and VII in the existing Act. Factor VIII is redesignated as factor VI, which clarifies that the Commission should consider product-shifting in the foreign country as a general matter, rather than limiting its inquiry to a specific type of product shifting. Factor VII is redesignated as factor IX, which conforms to the general rule for imposition of antidumping and countervailing duties that the threat of material injury be "by reason of" imports of the dumped or subsidized merchandise.

H.R. 5110 makes conforming changes to section 771(7)(F)(ii) of the Act requiring that further dumped or subsidized imports must be "imminent" and that "material injury would occur" absent relief. This new language is fully consistent with the Commission's practice in making threat determinations, the existing statutory language which requires that threat determinations be based on "evidence that the threat of material injury is real and that actual injury is imminent," and judicial precedent interpreting the statute.

A threat of material injury determination is subject to the same evidentiary requirements and judicial standard of review as a present material injury determination. Because of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such determinations as provided in the Agreements.

Reasons for change

The changes to U.S. law are made to track more specifically the language contained in Articles 3.7 and 3.8 of the Antidumping Agreement, and Articles 15.7 and 15.8 of the Subsidies Agreement.

Section 222(d). Negligible imports

Present law

Under current U.S. law, section 771(7)(C)(5) of the Act, the Commission may decline to cumulate imports that "are negligible and have no discernible impact on the domestic industry." Negligible imports, however, are subject to injury determinations. Existing law defines negligible imports by reference to a number of qualitative factors the Commission must consider. By contrast, the Antidumping and Subsidies Agreements use a quantitative approach.

Explanation of provision

Section 222(d) of H.R. 5110 repeals current section 771(7)(C)(v) of the Act, which treats negligible imports as an exception to the cumulation requirement. In its place, section 222(d) adds section 771(24) to the Act, which implements the provisions of the Agreements concerning negligible imports.

Section 222(d) of H.R. 5110 repeals section 771(7)(C)(v) of the Act (which deals with cumulative analysis) and adds section 771(24) to implement Article 5.8 of the Agreement. Article 5.8 requires termination of investigations if the investigating authority determines that the volume of dumped or subsidized imports is negligible. Article 5.8 adopts a quantitative approach to negligibility. (Section 212(b) of H.R. 5110 makes conforming amendments to sections 703(a), 705(b), 733(a), and 735(b) of the Act.)

New section 771(24) defines negligible imports by incorporating the quantitative standards in Article 5.8. Imports from the country subject to investigation are negligible if they account for less than three percent of the volume of all such merchandise imported into the United States in the most recent 12-month period preceding the filing of the petition (or, in the case of a self-initiated investigation, the initiation of the investigation) for which data are available. The comparison of subject imports to total imports contrasts with current practice, under which the Commission evaluates the U.S. market share held by each country's imports in determining negligibility. Although the "three percent" definition of negligible imports appears only in the Antidumping Agreement, the definition of negligible imports in new section 771(24) will be applicable to both antidumping and countervailing duty investigations.

In threat of material injury analyses, the Commission will examine "actual" as well as "potential" import volumes. Import volumes at the conclusion of the 12-month period examined for purposes of considering negligibility may be below the negligibility threshold, but increasing at a rate that indicates they are likely to imminently exceed that threshold during the period the Commission examines in conducting its threat analysis. In such circumstances, the Commission will not make a material injury determination concerning such imports because they are currently negligible, but it will consider the imports for purposes of a threat determination.

There are two exceptions to the general "three percent" rule for negligibility. The first, which appears in new section 771(24)(A)(ii), states that imports will not be deemed negligible when countries, which individually account for less than three percent of total imports, collectively account for more than seven percent of total imports. Under H.R. 5110, the Commission is to aggregate imports from countries that individually account for less than three percent of total imports to determine whether the seven percent figure is satisfied. The Commission may aggregate only those countries as to which investigations were simultaneously filed (or self-initiated) and which are not subject to the exceptions to cumulation.

The second exception implements Article 27.9 of the Subsidies Agreement and applies only to countervailing duty investigations. New section 771(24)(B) establishes the negligibility thresholds for certain developing countries at four percent (rather than three percent) for individual countries, and at nine percent (rather than seven percent) for aggregated countries.

The Commission will continue its current practice of determining negligibility on the basis of each like produce that it designates in an antidumping or countervailing duty investigation. To make such a determination, the Commission will need information concerning the volume of total imports in addition to the volume of imports from the country(ies) subject to investigation. The Commission may not have access to either complete questionnaire data or official import statistics conforming exactly to the Commission's like product(s) designations, particularly in preliminary investigations. Therefore, new section 771(24)(C) permits the Commission to make reasonable estimates on the basis of available statistics. For example, if available U.S. government import statistics concern a basket tariff provision that is broader than the like product designated by the Commission, the Commission may reasonably estimate a figure from the data available for the total imports corresponding to the like product.

New section 771(24)(D) addresses negligibility in regional industry investigations. If the Commission determines that there is a regional industry, it will determine negligibility by reference to the volume of imports shipped into the region, instead of the volume of imports shipped into the United States as a whole.

Amended sections 703(a), 705(b)(1), 733(a), and 735(b)(1) require termination of the investigation if the Commission determines that imports are negligible. In contrast to current practice, the Commission will not make material injury or threat determinations when it determines that imports are negligible.

Under amended sections 703(a) and 733(a), the Commission in preliminary investigations will determine whether there is a reasonable indication that imports are not negligible. The Commission's standard regarding negligible imports in preliminary investigations shall be the same as its standard for material injury determinations in these investigations, as set forth in *American Lamb Co.* v. *United States*, 785 F.2d 994 (Fed. Cir. 1986). The amendments, however, are not intended to limit the Commission's ability to use reasonable estimates in calculating whether import volumes are negligible. The amendments are, however, intended to preclude termination based on negligibility in a preliminary investigation where, for example: (1) the Commission is uncertain regarding appropriate like product designations and corresponding import volumes are not negligible with respect to one of the arguably appropriate designations; or (2) imports are extremely close to the relevant quantitative thresholds and there is a reasonable indication that data obtained in a final investigation will establish that imports exceed the quantitative thresholds.

Reasons for change

The changes are made to conform U.S. statute to the Agreements.

Section 222(e). Cumulation

Present law

In general, under current U.S. law, section 771(7)(C)(iv) of the Act, and Commission practice, when determining whether a domestic industry has been materially injured by reason of imports from a particular country subject to an antidumping or countervailing duty investigation, the Commission cumulatively assesses the volume and effect of imports from all countries subject to investigation if those imports compete with each other and with the domestic like product. This analysis recognizes that imports from various countries that account individually for a small percentage of total market penetration, when combined may cause material injury (H. Conf. Rep. 1156, 98th Cong., 2d Sess. 173 (1984)).

Explanation of provision

Existing U.S. law and practice are largely consistent with the cumulation provisions of the Agreements. Nonetheless, certain modifications to the statute are necessary to ensure complete consistency. These changes are incorporated in section 222(e) of H.R. 5110, which adds section 771(7)(G) to the Act.

Competition Requirement.—As under current law, new section 771(7)(G)(i) requires imports to compete with each other and with the domestic like product to be eligible for cumulation. The new section will not affect current Commission practice under which the statutory requirement is satisfied, if there is a reasonable overlap of competition, based on consideration of relevant factors. See *Fundicao Tupy, S.A.* v. *United States*, 678 F. Supp. 898, 902 (Ct. Int'l Trade), *aff'd*, 859 F. 2d 915 (Fed. Cir. 1988).

Simultaneous Filing or Self-Initiation.—In conformity with the Agreements, new section 771(7)(G)(i) provides that the Commission cumulate imports only from countries as to which investigations under sections 702 or 732 were filed or self-initiated on the same day. The requirement of simultaneous filing will promote certainty in antidumping and countervailing duty investigations by defining, at the time of filing, the countries potentially subject to cumulative analysis.

Virtually all investigations are initiated based upon a petition filed by a domestic interested party. If, however, Commerce were to self-initiate an investigation under sections 702(a) or 732(a) without receiving a petition, that investigation would be eligible for cumulation with other investigations initiated pursuant to petitions filed on that same day.

The schedules for investigations that are filed on the same day may become staggered if parties in some, but not all, of the investigations request extensions of Commerce determinations. By basing the cumulation analysis on simultaneously filed investigations, section 771(7)(G) eliminates the incentive in multi-country investigations for respondents to seek extensions of individual Commerce determinations just to avoid cumulation.

While only imports in simultaneously filed (or self-initiated) investigations will be eligible for cumulative analysis, the Committee intends that the Commission retain the discretion to consider whether prior unfair imports have rendered the domestic industry more vulnerable to injury by reason of later dumped or subsidized imports.

New section 771(7)(G)(iii) provides that the Commission will make its determination in each of the staggered investigations based upon the record compiled in the first final investigation in which it makes a determination. This eliminates the need for the Commission to consider whether imports from the first-decided investigation that are subject to antidumping or countervailing duty orders have a "continuing effect" on "vote day" of each subsequent investigation. Compare *Chaparral Steel Co.* v. *United States*, 901 F.2d 1097 (Fed. Cir. 1990), with *Mitsubishi Materials Corp.* v. *United States*, 820 F. Supp. 608 (Ct. Int'l Trade 1993). The record of the later-decided investigations, however, will be supplemented by Commerce's final determination(s) in those investigations and the parties' comments thereon. Thus, all interested parties will have full opportunity to comment on all issues relevant to their respective injury determinations.

As discussed in more detail below, the Antidumping Agreement requires the consideration of the magnitude of the dumping margin in determining whether there is material injury by reason of the dumped imports. In preliminary injury determinations, where Commerce has not yet calculated a dumping margin, the Commission will use the dumping margins published in Commerce's notice of initiation. In final injury determinations, the Commission will use the dumping margins most recently published by Commerce before the record in the Commission investigation has closed. These may be either the margins published in Commerce's final determination, or if no final determination has been made, in its preliminary determination.

Cumulation Involving Refiled Petitions.—If a petitioner decides, after initiation of an investigation, that it wants to file petitions against additional countries and seeks cumulation of those imports with imports subject to a pending investigation, the petitioner may withdraw its petition in the pending investigation and then file a new petition including imports from the additional countries, thereby triggering the general cumulation rule in new section 771(7)(G)(i). Section 217 of H.R. 5110 amends sections 704(a) and 734(a) of the Act to permit Commerce and the Commission to use the records compiled in the earlier investigation in the refiled investigations. To prevent abuse and discourage repeated withdrawals and refilings, this provision is applicable only in the first instance that a petition is withdrawn and refiled within three months after withdrawal.

Exceptions to Cumulation Requirement.—New section 771(7)(G)(ii) modifies existing law by creating two new exceptions to the general rule on cumulation. The first exception is that the Commission may not cumulate imports for which Commerce has made a preliminary negative determination, unless Commerce has subsequently reached a final affirmative determination prior to the time of the Commission's final determination. Under current law, such imports are eligible for cumulation because they are still "subject to investigation." This change is necessary because the Agreements permit cumulation of imports only when there has been a finding (i.e., a Commerce initiation determination, preliminary determination, or final determination) that the margin of dumping or the countervailable subsidy rate is more than de minimis.

The second new exception is that imports that are the subject of terminated investigations may not be cumulated. This exception also implements the requirement of the Agreements that negligible or de minimis imports not be cumulated.

New section 771(7)(G)(ii) also retains two exceptions in the current law. The first partially exempts from cumulation imports from beneficiary countries under the Caribbean Basin Economic Recovery Act. For purposes of making a determination with respect to such countries, imports from beneficiary countries may be cumulated only with imports from other beneficiary countries. The second applies to imports from Israel. Imports from Israel may not be cumulated with imports from other countries unless the Commission first determines that the domestic industry is materially injured by reason of such imports from Israel.

Cumulation in Regional Industry Investigations.—New section 771(7)(G)(iv) codifies existing Commission practice of applying the same cumulation standards in regional industry investigations as in national industry investigations. In such investigations, any cumulative analysis is based on imports entering the pertinent region(s).

Cumulation and Threat of Material Injury.—Section 222(e) H.R. 5110 adds section 771(7)(H) to the Act to preserve the Commission's discretion to cumulate imports in analyzing threat of material injury. In conformity with the Agreement, each of the conditions and exceptions to potential cumulation that apply in a material injury analysis, including the requirement that investigations must be filed or self-initiated on the same day, apply in threat analysis.

Reasons for change

The statue is amended to reflect more specifically the obligations of the Agreement.

Section 222(f): Post-petition information

Present law

Courts have repeatedly recognized that the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for subject imports, thereby distorting post-petition data compiled by the Commission. See *Metallverken Nederland, B.V.* v. *United States*, 744 F. Supp. 281, 284 (Ct. Int'l Trade 1987); *USX Corp.* v. *United States*, 655 F. Supp 487, 492 (Ct. Int'l Trade 1987). The imposition of provisional duties, in particular, can cause a reduction in import volumes and an increase in prices of both the subject imports and the domestic like product. Similarly, improvements in the domestic industry's condition during an investigation can be related to the pendency of the investigation.

Explanation of provision

Section 222(f) of H.R. 5110 amends section 771(7) of the Act to address the probative value of post-petition data by adding section 771(7)(I). The new statutory provision emphasizes that the Commission should consider whether changes in the volume of imports, their price effects, and their impact on the domestic industry occurring since the filing of the petition are related to the pendency of the investigation.

The provision also is intended to make clear that, when the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition or the imposition of provisional duties, the Commission may presume that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than the pendency of the investigation, the Commission may reduce the weight to be accorded to the affected data. To the extent that the decision of the court of International Trade in *Chr. Bjelland Seafood/A/S* v. *United States*, slip op. 92–196 (Ct. Int'l Trade Oct. 23, 1992), could be interpreted as requiring the Commission to demonstrate that the change is not related to other factors, it is disapproved.

Reasons for change

The change is made to clarify U.S. law on this issue.

Section 222(h). Ordinary course of trade

Present law

Under existing U.S. law, section 771(15) of the Act, the term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is subject of an investigation, have been normal in the trade under consideration with respect to merchandise in question.

Explanation of provision

Section 222(h) H.R. 5110 amends section 771(15) of the Act to specify additional types of transactions that Commerce may consider to be outside the ordinary course of trade, including: (1) sales disregarded as being below-cost under new section 773(b)(1); and (2) transactions disregarded under new section 773(f)(2), *i.e.*, transactions between affiliated persons that are disregarded for purposes of calculating cost. Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Committee intends that Commerce will interpret section 771(15) in a manner that will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 222(i). Other definitions

Identification of Costs To Be Calculated

Present law

Under current practice, where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value.

Explanation of provision

Section 222(i)(1) of H.R. 5110 adds section 771(28) to the Act which defines the term "exporter or producer" to include, where appropriate, both the exporter and producer of merchandise subject to an antidumping proceeding.

Reasons for change

The purpose of section 771(28), which is consistent with current Commerce practice, is to clarify that where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm in calculating cost of production and constructed value.

Affiliated Persons

Present law

Current U.S. law contains two definitions of persons who may be considered to be related, sections 771(13) and 773(e)(4) of the Act. Section 771(13) defines an exporter—for the purpose of determining United States price—as including the person by whom or for whose account the merchandise is imported into the United States if: the person is the agent or principal of the exporter, manufacturer, or producer; the person owns or controls any interest in the business of the exporter, manufacturer, or producer; the exporter, manufacturer, or producer owns or controls any interest in any business conducted by such person; or the person or persons, jointly or severally own or control in the aggregate 20 percent or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 percent or more of such power or control in the business of the exporter, manufacturer, or producer.

Section 773(e)(4) defines related parties as: (1) members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; (2) any officer or director of an organization and such organization; (3) partners; (4) employer and employee; (5) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization; and (6) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

Finally, under existing law, Commerce applies the definition of "exporter" in section 771(13) primarily to determine when an importer is "connected" to the exporter so as to warrant the use of "exporters sales price" as the basis for U.S. price.

Explanation of provision

Section 222(i)(1) of H.R. 5110 amends section 773(e)(4) by redesignating it as section 771(33), retitling it "Affiliated Persons," and adding new subparagraph (G), which provides that any person who controls any other person and that other person will be considered affiliated persons. Consistent with the Agreement, "control" exists if one person is legally or operationally in a position to exercise restraint or direction over another person. The Committee believes that including control in the definition of "affiliated" will permit a more sophisticated analysis which better reflects the realities of the marketplace.

The question of affiliation is relevant to a number of price and cost issues in an antidumping investigation or review. One example is the special rule for major inputs in existing section 773(e)(3). Under the amended definition of "affiliated persons," Commerce may examine such transactions when the purchaser of the major input is in a position to exercise restraint or direction over the input supplier (or vice versa).

Paragraphs (2) and (3) of new section 773(f) addresses the treatment of transactions between affiliated parties for purposes of calculating cost. Under the existing statute, these provisions literally apply only to the calculation of constructed value. The legislation relocates these paragraphs to section 773(f) to clarify that they apply for purposes of analyzing sales below cost of production and constructed value.

Finally, Section 222(i)(2) of H.R. 5110 repeals section 771(13) of the Act—the definition of "exporter"—because the new term "affiliated" is used for the purpose of determining export price and constructed export price in new sections 772 (a) and (b).

Section 223. Export price and constructed export price

NOTE.—Sections 223 and 224 of H.R. 5110 amend sections 772 and 773 of the Act, respectively, and establish new rules regarding the determination of export price or constructed export price, and normal value and ensuring a fair comparison between them. Section 772 establishes rules governing the determination of export price and constructed export price while section 773 establishes rules governing the determination of normal value.

Present law

Current U.S. law distinguishes between "purchase price" (to be called the "export price" under new section 772) and "exporter's sales price" (to be called "constructed export price" under new section 772). Under existing law, if the first sale to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation, then Commerce will base its calculation on the "purchase price." If, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter, then Commerce will base its calculation on the "exporter's sales price."

Explanation of provision

New section 772 retains the distinction in current U.S. law between export price (formerly purchase price) and constructed export price (formerly exporter's sales price). Notwithstanding the change in terminology, no change is intended in the circumstances under which export price versus constructed export price are to be used.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Adjustments to Export Price and Constructed Export Price

Present law

Under current law, section 772, Commerce calculates the U.S. price—purchase price or exporter's sales price—by *adding* to the starting prices: (1) packing costs for shipment to the United States, if not included in the price; (2) import duties that are rebated or not collected due to the exportation of the merchandise (duty drawback); (3) the amount of any consumption taxes paid on home market sales not collected on sales to the United States; and (4) countervailing duties attributable to export subsidies. Current law also requires that Commerce *reduce* U.S. price to account for: (1) transportation and other expenses, including warehousing expenses, incurred in bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States; and (2) if included in the price, export taxes or other charges imposed by the exporting country. Additionally, exporter's sales price is calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of: (1) any direct and indirect selling expenses; (2) expenses resulting from value added by a manufacturing process or assembly performed on the merchandise after its importation into the United States; and (3) profit associated with any such manufacturing process or assembly operations.

Explanation of provision

New sections 772(c)(1) and 772(c)(2) preserve these aspects of U.S. law. In addition, they make the following changes.

New sections 722(d)(1) and 772(d)(2) retain current U.S. law with respect to the deduction made for direct and indirect expenses and the deduction made for value added from processing or assembly in the United States, with two changes. First, Commerce's current calculation of profit on value added from processing or assembly will be discontinued because the deduction for profit is now made under section 772(d)(3). Second, new section 772(e) establishes a special rule that provides Commerce with alternate methods to calculate constructed export price where a substantial amount of value is added after importation, as discussed below.

New section 772(d)(3), requires that Commerce deduct from the constructed export price an allowance for any profit allocable to the selling, distribution, and further manufacturing expenses incurred in the United States. The deduction of profit under new section 772(d)(3) is a new adjustment in U.S. law, consistent with the language of the Agreement, which reflects that constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers.

Section 772(d)(3) requires Commerce, in determining the constructed export price, to identify and deduct from the starting price in the U.S. market an amount for profit allocable to selling, distribution and further manufacturing activities in the United States. The profit to be deducted from the starting price in the U.S. market is that proportion of the total profit equal to the proportion which the U.S. manufacturing and selling expenses constitute of the total manufacturing and selling expenses. Thus, the profit to be deducted from the starting price in the U.S. market will be calculated by multiplying the total profit by the percentage obtained by dividing total U.S. expenses by total expenses. The total U.S. expenses are all of the expenses deducted under Section 772(d) (1) and (2) in determining the constructed export price. The total expenses are all expenses incurred by or on behalf of the foreign producer and exporter and the affiliated seller in the United States with respect to the production and sale of the first of the following alternatives which applies: (1) the subject merchandise sold in the United States and the foreign like product sold in the exporting country (if Commerce requested this information in order to determine the normal value and the constructed export price); (2) if Commerce did not request the information required to determine total expenses under (1), the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise; or (3) if the data necessary to determine total expenses under (1) and (2) are not available, the narrowest category of merchandise sold in all countries which includes the subject merchandise. The total profit is calculated on the same basis as the total expenses.

It is the Committee's intent that Commerce will request the information necessary to determine total expenses under the first alternative if Commerce is conducting a cost of production investigation. If Commerce is not conducting a cost of production investigation, the respondent may submit the necessary information on a voluntary basis. In such cases, Commerce will use the information if it is practicable to do so and the information can be verified. Under the second two alternatives, the information is obtained from financial reports. Whether alternative (2) or (3) is used will depend on the detail in which such reports break down total production and selling expenses and profits.

This same formula applies regardless of which of the three methods is used to determine total expenses. No distortion in the profit allocable to U.S. sales is created if total profit is determined on the basis of a broader product-line than the subject merchandise, because the total expenses are also determined on the basis of the same expanded product line. Thus, the larger profit pool is multiplied by a commensurately smaller percentage.

If there is no profit to be allocated (because the affiliated entity is operating at a loss in the United States and foreign markets) Commerce will make no adjustment under section 772(d)(3). This calculation of profit has no relationship to, nor effect upon, the calculation of transfer pricing under section 482 of the Internal Revenue Code. The transfer price between exporters or producers and the affiliated importer is irrelevant in determining the amount of profit to be deducted from constructed export price.

New section 772(e) establishes a simpler and more effective method for determining export price in situations where an affiliated importer adds value to subject merchandise after importation. To avoid imposing an unnecessary burden on Commerce, section 772(e) authorizes Commerce to determine export price based on alternative methods when it appears that the value added in the United States is estimated to be substantially more than half of the price of the merchandise as sold in the United States.

The alternative methods for establishing export price are: (1) the price of identical subject merchandise sold by the exporter or producer to an unaffiliated person; or (2) the price of other subject merchandise sold by the exporter or producer to an unaffiliated person. There is no hierarchy between these alternative methods of establishing the export price. If there is not a sufficient quantity of sales under either of these alternatives to provide a reasonable basis for comparison, or if Commerce determines that neither of these alternatives is appropriate, Commerce may use any other reasonable method to determine constructed export price, provided that it provides to interested parties a description of the method chosen and an explanation of the basis for its selection. Such a method may be based upon the price paid to the exporter or producer by the affiliated person for the subject merchandise, if Commerce determines that such a price is appropriate.

Unlike the practice under current law, the imported components will not be exempt from antidumping duties.

For purposes of estimating whether the value added in the United States is likely to exceed substantially the value of the imported product, it is the Committee's intent that Commerce not be required to perform a precise calculation of the value added. Requiring such a precise calculation would defeat the purpose of the new rule. Commerce will provide interested parties, normally as part of the preliminary determination, with a description of the method chosen and an explanation regarding the selection of such method.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 224. Normal value

NOTE.—The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price, and normal value is stated in and implemented by new section 773. To achieve such a fair comparison, new section 773 provides for the selection and adjustment of normal value to avoid or adjust for differences between sales that affect price comparability.

Under new section 773(a), as under existing law, the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. Consistent with the Agreement, if home market sales of a foreign like product do not exist or are not useable as a basis for determining normal value (called "foreign market value" under current law), Commerce may identify and measure dumping by comparing the export price or constructed export price to normal value based on either: (1) sales of the foreign like product to a country other than the United States; or (2) constructed value.

Identification of the Starting Price

Present law

Current law, Section 773(a)(5) of the Act, permits (but does not require) Commerce to base normal value on sales to related (now "affiliated") parties in the home market. However, Commerce ignores sales to affiliated parties which cannot be demonstrated to be at arm's length prices for purposes of calculating normal value.

Explanation of provision

New section 773(a)(1)(B) continues the practice of existing section 773(a)(5) of, in general, not using sales to affiliated parties as a starting price. In addition, section 773(a)(1)(B)(i) codifies Commerce's current practice of calculating normal value, to the extent practicable, on the basis of home market sales that are made at the same level of trade as the constructed export price or the starting price for the export price. Under section 773(a)(1)(B)(ii), these same rules would apply to the calculation of normal value based on third country sales.

New section 773(a)(2) retains the requirement of section 773(a)(5) in existing law that Commerce not base normal value on home market sales which were made to establish a fictitious market. The changes in terminology and relocation of this provision are not intended to alter current law.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Price-to-Price Comparisons: Market Viability

Present law

Under current U.S. law, the general rule for determining when Commerce may base normal value on home market sales in the exporting country provides that the home market is not considered to be a "viable" basis for comparison if the quantity of goods sold in the home market is "so small" (in Commerce practice, 19 CFR 353.48, normally less than five percent) of the quantities sold to countries other than the United States.

Explanation of provision

New section 773(a)(1)(C) changes the test under current U.S. law to provide that the volume of sales in the home market normally will be deemed insufficient, i.e., the home market will not be considered "viable," if the quantity of sales by the exporter in the home market is less than five percent of the quantity of sales by the exporter to the U.S. market. This change from current law, under which the volume of home market sales is compared to the volume of sales to countries other than the United States, will prevent the use of "thin" home markets as the basis for identifying dumping.

Consistent with the Agreement, new section 773(a)(1)(C)(iii) provides that Commerce may determine that home market sales are inappropriate as a basis for determining normal value if the particular market situation would not permit a proper comparison. The Agreement does not define "particular market situation," but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

Finally, H.R. 5110 makes conforming changes to section 773(d) of the Act, which addresses the viability of the home market in situations involving multinational enterprises.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Price-to-Price Comparisons: Third-Country Sales

Present law

Under current U.S. law, Commerce may use sales to a single or multiple third countries in cases in which the home market is not viable. When using third-country sales, Commerce uses sales from more than one third country to ensure that their volume is five percent or more of the volume of sales to the United States.

Explanation of provision

New section 773(a)(1)(B)(ii) makes two changes to existing law to conform it more closely to the Agreement: (1) it permits the use of sales only to a single third country; and (2) consistent with the Agreement, the price to the third country must be a representative price.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Basic Adjustments to Normal Value

Present law

Section 773(a)(1) of the Act provides that the foreign market value be increased for U.S. packing costs. When the starting price in the home market includes packing costs, Commerce deducts these before adding the U.S. costs.

Explanation of provision

New section 773(a)(6) includes these same adjustments but provides for two additional reductions for: (1) if included in the price, transportation and other expenses, including warehousing expenses, incurred in bringing the merchandise from the original place of shipment in the exporting country to the place of delivery in the exporting country or a third country; and (2) the amount of any indirect taxes imposed on the foreign like product or components thereof that have been rebated or not collected, but only to the extent that such taxes are added to or included in the price of the foreign like product.

Reasons for change

The existing statute requires the deduction of transportation and other movement-related expenses from export price, but is silent regarding similar costs in foreign markets. New section 773(a)(6)(B) explicitly provides for the deduction of movement charges from normal value. Failure to deduct all movement charges from the foreign price would result in a distorted comparison. This change reflects Article 2.4 of the Agreement, which requires that prices normally be compared at the ex-factory level.

The deduction from normal value for indirect taxes constitutes a change from the existing statute. The change is intended to ensure that dumping margins will be tax-neutral. The requirement that the home-market consumption taxes in question be "added to or included in the price" of the foreign like product is intended to insure that such taxes actually have been charged and paid on the home market sales used to calculate normal value, rather than charged on sales of such merchandise in the home market generally. It would be inappropriate to reduce a foreign price by the amount of the tax, unless a tax liability had actually been incurred on that sale.

Additional Adjustments to Normal Value

Present law

Current U.S. law authorizes Commerce to adjust foreign market value (to be called "normal value") to account for other differences (or the lack thereof) between purchase price (or exporter's sales price) and foreign market value that are wholly or partly due to differences in quantities, physical characteristics, or other differences in the circumstances of sale. With respect to each of these adjustments, as well as with all other adjustments, Commerce ensures that there is no overlap or double-counting of adjustments.

Explanation of provision

Section 773(a)(6)(C) essentially retains existing Commerce practice. Section 773(a)(6)(C)(i) provides that Commerce may adjust normal value to account for the fact that the transactions involving the subject merchandise may involve greater or lesser quantities of merchandise than the transactions involving the foreign like product.

Section 773(a)(6)(C)(ii) provides for adjustments to account for any differences in costs attributable to physical differences between the merchandise exported to the United States and the merchandise sold in the home or third country market. The Committee intends that Commerce will continue its current practice of limiting this adjustment to differences in variable costs associated with the physical differences.

Section 773(a)(6)(C)(iii) retains Commerce's authority to make adjustments for differences in the circumstances of sales used to establish normal value, and those used to establish export price and constructed export price. The Committee intends Commerce's current practice with respect to this adjustment to remain unchanged, except with respect to the "constructed export price offset" (discussed below).

Level of Trade Adjustments

Present law

Current U.S. law, section 773(a)(4) of the Act, provides that if it is established to the satisfaction of Commerce that the amount of any difference between the U.S. price and the foreign market value (or the fact that the U.S. price is the same as the foreign market value) is wholly or partly due to "differences in the circumstances of sale," Commerce is to make due allowance therefore. Current U.S. law does not deal specifically with differences in levels of trade. However, section 353.58 of Commerce regulations provides for comparisons at the same level of trade or appropriate adjustment for differences affecting price comparability.

Explanation of provision

The Agreement provides that, where authorities use a constructed export price and the use of such a price results in the comparison of sales at different levels of trade, authorities shall either: (1) establish the normal value at a level of trade equivalent to the level of trade of the constructed export price; or (2) make due allowance as warranted. The statutory scheme, which provides for comparison at the same level of trade or, when levels of trade are different, consideration of a level of trade adjustment or constructed export price offset, is designed to ensure that a proper comparison is made. H.R. 5110 implements this provision in two different ways.

First, as noted above, new section 773(a)(1)(B) requires that Commerce, to the extent practicable, establish normal value based on home market (or third country) sales at the same level of trade as the constructed export price or the starting price for the export price. If Commerce is able to compare sales at the same level of trade, it will not make any level of trade adjustment or constructed export price offset in lieu of a level of trade adjustment.

Second, when sales in the U.S. and foreign markets cannot be compared at the same level of trade, an adjustment to normal value may be appropriate. New section 773(a)(7)(A) provides that, after making all appropriate adjustments to export price or constructed export price and normal value, Commerce shall adjust normal value to account for any differences in these prices that are demonstrated to be attributable to differences in the level of trade of the comparison sales in each market. This adjustment may either increase or decrease normal value. Commerce will grant such adjustments only where: (1) there is a difference in the level of trade (*i.e.,* there is a difference between the actual functions performed by the sellers at the different levels of trade in the two markets); and (2) the difference affects price comparability.

Commerce will carefully investigate whether a level of trade adjustment should be made to increase or decrease normal value. However, if a respondent claims an adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment.

Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade. Nominal reference to a company as a "wholesaler," for example, will not be sufficient. On the other hand, Commerce need not find that the two levels involve no common selling activities to determine that there are two levels of trade. Because level of trade adjustments may be susceptible to manipulation, Commerce will closely scrutinize claims for such adjustments. For example, a sales subsidiary created merely to perform the role of a *de facto* sales department is not an appropriate basis for adjustment.

The effect on price comparability is measured by examining price differences between goods sold to different levels of trade in the foreign market where normal value is being established. Commerce will measure any effect on price comparability by determining if there is a pattern of price difference between sales at the different levels of trade in the foreign market. While the pattern of pricing at the two levels of trade under section 773(a)(7)(A) must be different, the prices at the levels need not be mutually exclusive; there may be some overlap between prices at the different levels of trade.

Any adjustment under section 773(a)(7)(A) will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value. The Committee intends that Commerce normally will base the calculation of the adjustment on sales of the same product by the same company; however, if information on the same product and company is not available, the adjustment may also be based on sales of other products by the same company. In the absence of any sales, including those in recent time periods, to different levels of trade by the exporter or producer under investigation, Commerce may consider the selling experience of other products in the foreign market for the same product or other products. Where different products, company experiences, or time periods are used, Commerce will ensure that price differences reflect differences in levels of trade that are relevant to the product under consideration rather than differences in the nature of the products, companies or time periods.

Commerce will not make an adjustment based on the fact that expenses or costs differ between the two levels of trade. An effect on price comparability must be identified and measured by observed differences between prices at different levels of trade. Commerce will isolate the price effect, if any, attributable to the sale at different levels of trade, and will ensure that expenses previously deducted from normal value are not deducted a second time through a level of trade adjustment. For example, Commerce will ensure that a percentage difference in price is not more appropriately attributable to differences in the quantities purchased in individual sales.

Where it is established that there are different levels of trade based on the performance of different selling activities, but the data establish that there is a pattern of no price differences, the level of trade adjustment will be zero. No further adjustment is necessary.

Only where different functions at different levels of trade are established under section 773(a)(7)(A)(i), but the data available do not form an appropriate basis for determining a level of trade adjustment under section 773(a)(7)(A)(ii), will Commerce make a constructed export price offset adjustment under section 773(a)(7)(B). The adjustment will be "capped" by the amount of indirect expenses deducted from constructed export price under new section 772(d)(1)(D). In some circumstances, the data may not permit Commerce to determine the amount of the level of trade adjustment. For example, there may be no, or very few sales of a sufficiently similar product by a seller to independent customers at a different levels of trade. This could be the case where there is only one foreign respondent and all sales are to affiliated purchasers. Also, there could be restrictive business practices which result in too few appropriate sales to determine a price effect. Similarly, the data could indicate a clearly contradictory result, for example contradictory patterns during different periods. In such situations, although an adjustment might have been warranted, Commerce may be unable to determine whether there is an effect on price comparability. In such situations, although there is a difference in levels of trade, Commerce may be unable to quantify the adjustment. Where this occurs, Commerce will make a capped "constructed export price offset" adjustment under section 773(a)(7)(B), in lieu of the level of trade adjustment that would be warranted under section 773(a)(7)(A).

The constructed export price offset adjustment will be made only where normal value is established at a level of trade more remote from the factory than the level of trade of the constructed export price; *i.e.*, where the adjustment under 773(a)(7)(A), if it could have been quantified, would likely have resulted in a reduction of the normal value. The capped constructed export price offset adjustment will not be available to parties that refuse to provide necessary level of trade data.

Adjustments to Constructed Value

Present law

While present statute levels does not specifically address adjustments to constructed value, Commerce's practice is to make circumstance of sale adjustments to constructed value where appropriate.

Explanation of provision

New section 773(a)(8) makes explicit Commerce's authority to make appropriate adjustments to constructed value when amended section 773(e) serves as the basis for normal value, thereby ensuring continuation of current practice. Such adjustments will be made under the same conditions as under current law.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Exlusion of Sales Below Cost from Determination of Normal Value

Present law

Since 1974, U.S. law has provided for the exclusion of below-cost foreign market sales as a basis for determining foreign market (normal) value. Section 773(b) of the Act currently provides that Commerce will determine whether foreign market sales are at prices below cost when it has "reasonable grounds to believe or suspect" that such sales have occurred. Such sales must be excluded from the determination of foreign market value if such sales occurred: (1) in substantial quantities; (2) over an extended period of time; and (3) at prices that do not permit the recovery of all costs within a reasonable period of time. If remaining above-cost sales are inadequate, Commerce is directed to base foreign market value on constructed value.

Explanation of provision

New section 773(b) incorporates the requirements of the Agreement, which, but for a few changes, are based on the existing U.S. law. Overall, these changes provide improved criteria for determining when to exclude below-cost sales as a basis for normal value.

The current statutory requirement that below-cost sales occur over an extended period of time is replaced by the requirement that such sales occur within an extended period of time. As in the Agreement, the term "extended period of time" is defined in new section 773(b)(2)(B) as being normally one year, but not less than six months. This is a change from current Commerce practice, under which the below-cost inquiry is confined to the normal six-month period of the initial antidumping investigation. By providing that below-cost sales need occur only within (rather than over) an extended period of time, Commerce no longer must find that below-cost sales occurred in a minimum number of months before excluding such sales from its analysis. In addition, the use of the term "within" means that for purposes of calculating the quantity of below-cost sales, Commerce will examine below-cost sales occurring during the entire period of investigation or review, as opposed to a shorter time period.

Another change concerns the definition of "substantial quantities." Under existing practice, Commerce considers below-cost sales to be in substantial quantities if they account for ten percent of total sales. Under new section 773(b)(2)(C), the benchmark is twenty percent. Commerce also may consider below-cost sales to be in substantial quantities if the weighted-average per unit price of the sales under consideration is less than the weighted-average per unit cost of production for such sales. This latter rule closely corresponds to the current Commerce practice of determining substantial quantities of sales below cost for highly perishable agricultural products, and will be the measurement of substantial quantities for such products in the future.

In addition, new section 773(b)(2)(D) specifies when particular prices provide for cost recovery within a reasonable period of time. Under current law, there is not clear definition of cost recovery—the measure of cost recovery could have been based on speculative estimates of future production costs. Under the amended law, if prices which are below costs at the time of sale are above weighted-average costs for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

The determination of cost recovery is based on an analysis of actual weighted-average prices and costs during the period of investigation or review, except that, before testing for cost recovery, such costs incurred during the period of investigation or review may be adjusted as appropriate to take account of variations in unit costs caused by periodic temporary disruptions to production that occur on a less frequent than annual basis. For example, major maintenance may be scheduled every three years. While this maintenance is performed, output is suspended or reduced. This results in unit costs being artificially increased in years when the maintenance is performed and depressed in other years. To account for this, Commerce will spread out the effect of such disruptions over the appropriate period of time so that a proportional effect is recognized. The party claiming the adjustment must demonstrate that the disruptions have recurred at regular and predictable intervals. Although not a matter of cost recovery, when an unforeseen disruption in production occurs which is beyond management's control (*e.g.*, destruction of production facilities by fire), Commerce will continue its current practice of using the costs incurred for production prior to such unforeseen event. As under current practice, the cost test generally will be performed on no wider than a model-specific basis.

If home market (or third country) sales are below-cost and all of the criteria of section 773(b) are satisfied, Commerce may exclude such sales for purposes of determining normal value. The Committee intends that Commerce will disregard sales when the conditions in the law are met. However, in some cases, below-cost sales may be used to determine normal value if those sales are of obsolete or end-of-model-year merchandise. Such merchandise is often sold at less than cost as was recognized in the legislative history of the Trade Act of 1974. H. Rep. No. 571, 93rd Cong., 1st Sess. 70–71 (1973); S. Rep. No. 1298, 93rd Cong., 2nd Sess., 173 (1974). It is appropriate to use these sales as the basis of normal value when the merchandise exported to the United States is similarly obsolete or end-of-model year.

The existing statute provides that where below-cost sales are disregarded, Commerce shall use the remaining above-cost sales as the basis for determining foreign market (normal) value if such sales are "adequate." As a matter of practice, Commerce has used above-cost sales where they account for ten percent or more of total sales. New section 773(b)(1) changes this practice by requiring Commerce to use above-cost sales if they exist, and if such sales are otherwise in the ordinary course of trade. Only if there are no above-cost sales in the ordinary course of trade in the foreign market under consideration will Commerce resort to constructed value.

New section 773(b)(2)(A) retains the current requirement that Commerce have "reasonable grounds to believe or suspect" that below-cost sales have occurred before initiating such an investigation. "Reasonable grounds" will exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below-cost prices. In addition, new section 773(b)(2)(A)(ii), which codifies existing Commerce practice, provides that in the context of administrative reviews of antidumping orders, reasonable grounds exist if Commerce has excluded below-cost sales of a particular exporter or producer from the determination of normal value in the most recently completed segment of the antidumping proceeding.

The changes described above are intended to permit Commerce to initiate below-cost inquiries at the outset of a case, thereby enhancing Commerce's ability to complete investigations and reviews in a timely, transparent, and effective manner. The ability to substantiate a below-cost allegation on the basis of observed or constructed prices and costs will enable Commerce to address the allegation of below-cost sales at an earlier stage of a proceeding than possible under current practice, thereby providing all parties with a greater opportunity to comment on Commerce's analysis.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Calculation of Costs

Present law

Under existing U.S. law and practice, Commerce normally calculates costs on the basis of records kept by the exporter or producer of the merchandise, provided such records are kept in accordance with generally accepted accounting principles of the exporting (or producing) country and reasonably reflect the costs associated with the production and sale of the merchandise.

Explanation of provision

Section 224 of H.R. 5110 adds new section 773(f) to the Act to incorporate the provisions of the Agreement regarding the calculation of costs. In addition, section 773(f) harmonizes the methods of calculating cost for purposes of examining sales below cost and determining constructed value.

Under new section 773(f), Commerce will continue its current practice of calculating costs on the basis of records kept by the exporter or producer of the merchandise, provided such records are kept in accordance with generally accepted accounting principles of the exporting (or producing) country and reasonably reflect the costs associated with the production and sale of the merchandise. Commerce will consider all available evidence submitted by the exporter or producer on a timely basis regarding the proper allocation of costs. The exporter or producer will be expected to demonstrate that it has historically utilized such allocations, particularly with regard to the establishment of appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Also, if Commerce determines that costs, including financing costs, have been shifted away from production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Non-Recurring Costs

Present law

There is no corresponding provision of current U.S. statute.

Explanation of provision

Section 224 of H.R. 5110 adds section 773(f)(1)(B) to the Act to incorporate the provisions of the Agreement regarding the treatment of non-recurring costs. Under this section, Commerce, will, as is its current practice, associate an expenditure with all production benefitting from that expenditure.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Startup Costs

Present law

There is not corresponding provision of current U.S. statute.

Explanation of provision

Section 224 of H.R. 5110 also adds section 773(f)(1)(C) of the Act to the Act to incorporate the provisions of the Agreement regarding the treatment of startup costs.

In calculating costs of production and constructed value, it is appropriate to take into account that a firm may experience unusually high costs when it is "starting up" a new product or new production facilities. However, any adjustment for such startup costs must be carefully limited to ensure that such an adjustment is not transformed into a license to dump. Section 773(f)(1)(C) accomplishes these objectives.

Defining startup.—Under new section 773(f)(1)(C)(ii), Commerce may make an adjustment for startup costs only if the following two conditions are satisfied: (1) a company is using new production facilities or producing a new product that requires substantial additional investment; and (2) production levels are limited by technical factors associated with the initial phase of commercial production. Mere improvements to existing products or ongoing improvements to existing facilities will not qualify for a startup adjustment. Commerce also will not consider an expansion of the capacity of an existing production line to be a startup operation unless the expansion constitutes such a major undertaking that it requires the construction of a new facility and results in a depression of production levels due to technical factors associated with the initial phase of commercial production of the expanded facilities.

"New production facilities" includes the substantially complete retooling of an existing plant. Substantially complete retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery. A "new product" is one requiring substantial additional investment, including products which, though sold under an existing nameplate, involve the complete revamping or redesign of the product. This would not include routine model year changes. For example, a new model year automobile with incremental changes would not be considered a new product, but a completely redesigned model with a new structure would be so considered. Similarly, a 16 megabyte Dynamic Random Access Memory (DRAM) chip, for example, would be considered a new product if the latest version of the product had been a 4 megabyte chip. However, an improved version of a 16 megabyte chip (e.g., a physically smaller version) would not be considered a new product.

Duration of the startup period.—Under new section 773(f)(1)(C)(ii), startup will be considered to end at the time the level of commercial production characteristic of the merchandise, producer, or industry concerned is achieved. The attainment of peak production levels will not be the standard for identifying the end of the startup period, because the startup period may end well before a company achieves optimum capacity utilization. In addition, consistent with the basic definition of a startup situation, Commerce will not extend the startup period so as to cover improvements and cost reductions that may occur over the entire life cycle of a product.

To determine when a company reaches commercial production levels, Commerce will consider first the actual production experience of the merchandise in question. Production levels will be measured based on units processed. To the extent necessary, Commerce also will examine other factors, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products. A producer's projections of future volume or cost will be accorded little weight, as actual data regarding production are much more reliable than a producer's expectations.

In determining whether commercial production levels have been achieved and that the startup period is measured appropriately, Commerce will consider factors unrelated to startup operations that may have affected the volume of production processed, such as demand, seasonality, or business cycles. For example, commercial production levels may be low not because a company is in a startup situation, but because the industry in question is in the trough of its business cycle.

The Committee recognizes that the nature and timing of startup operations will vary from industry to industry and from product to product, and that any determination of the appropriate startup period involves a fact-intensive inquiry. In some industries, the startup period could be as short as one or two months; in others it could be much longer. For this reason, the Committee intends that Commerce determine the duration of the startup period on a case-by-case basis.

Startup adjustment methodology.—New section 773(f)(1)(C)(iii) sets out the basic methodology for making startup adjustments. If the criteria for making a startup adjustment are satisfied, Commerce will replace unit production costs incurred during the startup period with unit production costs incurred at the end of the startup period. An adjustment for startup may result in the exclusion from the cost calculation of actual costs incurred by a company during the startup period. As the startup adjustment results in some costs not being counted during the startup phase, the difference between actual costs and the costs of production calculated for startup costs will be amortized over a reasonable period of time subsequent to the startup phase over the life of the product or machinery, as appropriate.

In certain situations, the startup period may extend beyond the period of the investigation or administrative review, possibly even beyond the deadline for Commerce's final determination. In such cases, Commerce must cut off the submission of additional information to allow itself time to analyze and verify the data, as well as to provide interested parties with an opportunity to comment on the data. Consistent with the Agreement, Commerce will use as startup costs the most recent costs incurred prior to the end of the startup period that Commerce reasonably can take into account without delaying the timely completion of the investigation or administrative review.

Commerce will consider unit production costs to be items such as depreciation of equipment and plant, labor costs, insurance, rent and lease expenses, material costs, and overhead. However, sales expenses, such as advertising costs, or other non-production costs, will not be considered startup costs because they are not directly tied to the manufacturing of the product.

The Committee intends that the burden will be on companies to demonstrate their entitlement to a startup adjustment. Specifically, companies must demonstrate that, for the period under investigation or review, production levels were limited by technical factors associated with the initial phase of commercial production and not by factors unrelated to startup, such as marketing difficulties or chronic production problems. In addition, to receive a startup adjustment, companies will be required to explain their production situation and identify those technical difficulties associated with startup that resulted in the under utilization of facilities. This is consistent with the general rule in antidumping practices that a party seeking an adjustment has the burden of establishing entitlement to that adjustment as both a legal and factual matter.

Profit and Selling, General, and Administrative Expenses for Constructed Value

Present law

Section 773(e)(1)(B) of the Act directs Commerce to include in the amount for constructed value an amount for general expenses that is not less than 10 percent of the cost of materials, fabrication and processing and an amount for profit that is not less than 8 percent of such costs.

Explanation of provision

Section 224 of H.R. 5110 replaces these provisions of existing law with new section 773(e)(2) of the Act.

New section 773(e)(2) establishes new methods of calculating selling, general, and administrative (SG&A) expenses and profits consistent with the methods provided for in the Agreement.

First, new section 773(e)(2)(A) establishes as a general rule that Commerce will base amounts for SG&A expenses and profit only on amounts incurred and realized in connection with sales in the ordinary course of trade of the particular merchandise in question (foreign like product). Commerce may ignore sales that it disregards as a basis for normal value, such as those disregarded because they are made at below-cost prices. Other examples of sales that Commerce could consider to be outside the ordinary course of trade include sales of off-quality merchandise, sales to related parties at non-arm's length prices, and sales with abnormally high profits.

Second, new section 773(e)(2)(B) establishes alternative methods for calculating amounts for SG&A expenses and profit in those instances where the method described in section 773(e)(2)(A) cannot be used, either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices. These methods are: (1) actual amounts incurred or realized by the same producer on home market sales of the same general category of products; (2) the weighted-average of actual amounts incurred or realized by other investigated companies on home market sales in the ordinary course of trade (*i.e.*, profitable sales) of the foreign like product; or (3) any other reasonable method, provided that the amount for profit does not exceed the profit normally realized by other companies on home market sales of the same general category of products (the so-called profit cap).

Consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases. The Committee intends that the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data. Commerce will explain the basis for the selection of a particular methodology in a given case.

If alternative (3) is selected, Commerce will provide to interested parties a description of the method chosen and an explanation of why it was selected. The Committee does not believe that it is appropriate at this time to establish particular methods and benchmarks for applying this alternative. Instead, the Committee intends that Commerce will develop this alternative through practice, and that Commerce will determine on a case-by-case basis the profits "normally realized" by other companies on merchandise of the same general category.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Intermediate Country Sales

Present law

Section 773(f) of the Act requires that normal value be based on prices in the country of origin, while allowing normal value to be based on sales in an intermediate country if a list of conditions is satisfied.

Explanation of provision

Section 224 of H.R. 5110 redesignates and amends existing section 773(f) of the Act as new section 773(a)(3). New section 773(a)(3) paraphrases the requirement in current law that Commerce use sales in the intermediate country as a basis for normal value, except in the circumstance specified in the section.

Reasons for change

The change from current U.S. law is intended to effectuate more fully the obligations of the Agreement.

Section 225. Currency conversions

Present law

Existing U.S. law contains no provision on this issue.

Explanation of provision

Section 225 of H.R. 5110 adds new section 773A to the Act to implement the requirements of the Agreement regarding currency conversions. Typically in antidumping proceedings, the prices or costs used to determine normal value are denominated in a foreign currency. To determine whether dumping exists, these prices or costs must be converted to U.S. dollars. To a large extent, the Agreement tracks existing Commerce Department practice, the goal of which is to ensure that the process of currency conversion does not distort dumping margins. The Committee intends that Commerce will promulgate regulations implementing the requirements of section 773A. To the extent that the requirements of the Agreement apply only to investigations, as opposed to reviews, the regulations will reflect that distinction.

Under new section 773A, the general rule will be to convert foreign currencies based on the dollar exchange rate in effect on the date of sale. Under current practice, Commerce utilizes a quarterly rate, unless the daily rate varies by more than five percent from the rate in effect on the first day of the quarter. Some firms, including U.S. firms, commonly engage in hedging on forward currency markets to minimize their exposure to exchange rate losses. Therefore, as under existing practice, where a company demonstrates that a sale of foreign currency on forward markets is directly linked to a particular export sale, Commerce will use the rate of exchange in the forward currency sale agreement. Group sales of foreign currency on forward markets will be allowed, provided that sufficient documentation to establish the link between the currency purchase and the particular export sale is provided.

Section 773A also provides that Commerce will ignore fluctuations in exchange rates. In addition, in an investigation, Commerce will allow exporters at least sixty days in which to adjust their prices to reflect a sustained increase in the value of a foreign currency relative to the U.S. dollar.

Reason for change

Section 773A is added to U.S. law to implement the requirements of Article 2.4.1 of the Agreement.

Section 226. Proprietary and nonproprietary information

Present law

There is no comparable provision in U.S. statute.

Explanation of provision

Section 226(a)(2) of H.R. 5110 amends 777(b)(3) of the Act expressly to allow proprietary information submitted in connection with a sunset or changed circumstances review that resulted in termination of the order or suspended investigation to be used by the agency to which the information was originally submitted in a subsequent investigation involving the same subject merchandise, provided that the petition for such investigation was filed within two years of the termination or revocation. This provision will help conserve the resources of parties because many of the necessary data would have been collected by each of the agencies in the course of the preceding reviews.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Section 227. Opportunity for comment by consumers and industrial users

Present law

Under current U.S. law, there are no constraints on the ability of persons to file comments with Commerce or the Commission.

Explanation of provision

Section 227 of H.R. 5110 adds section 777(h) to the Act which specifies that both Commerce and the Commission will provide industrial users of the subject merchandise and representative consumer organizations, if the merchandise is commonly sold at the retail level, with an opportunity to provide relevant information. As described above, this is not a change in practice. Such comments must concern matters relevant to a particular determination of dumping, subsidization, or injury. It should be noted that subsection (h) does not *per se* confer interested party status on industrial users and consumer organizations. Unless they otherwise qualify as interested parties under section 771(9), such entities would not have the rights of interested parties, including access to proprietary information under administrative protective order, and standing to challenge agency determinations under section 516A of the Act.

Reason for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Section 228. Public notice and explanation of determinations

Present law

Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the "'path of the agency may reasonably be discerned'" by a reviewing court. See, e.g., *Ceramica Regiomontana, S.A.* v. *United States,* 810 F.2d 1137, 1139 (Fed. Cir. 1987) (quoting *Bowman Transportation* v. *Arkansas-Best Freight Sys.,* 419 U.S. 281, 286 (1974)); *National Association of Mirror Manufacturers* v. *United States,* 696 F. Supp. 642, 649 (Ct. Int'l Trade 1988). For example, current law requires the Commission to explain its reasoning, and particularly to address the three key factors of volume, price effects and impact, as well as any other relevant factor on which it has relied in its determination.

Explanation of provision

Section 228 of H.R. 5110 adds section 777(i) to the Act to codify in statute the obligations of the Agreements as reflected in current practice and to consolidate the existing public notice requirements, which are currently scattered throughout Title VII of the Act.

The Committee does not intend that new section 777(i) alter existing law regarding public notice and explanation of antidumping and countervailing duty determinations.

On the other hand, neither existing law nor new section 777(i) require Commerce or the Commission in every case to discuss every statutory factor, particularly where certain factors are not germane to a particular industry or investigation, or to discuss each argument or fact presented by a party, regardless of how irrelevant or trivial. For example, if the Commission rejects a party's proposed definition of the like product, the Commission need not necessarily, later in its opinion, continue to reference arguments on causation made by the party on the assumption that its proposed like product definition would be accepted.

Likewise, Commerce and the Commission need not issue explicit findings of fact or conclusions of law. Instead, the agencies must specifically reference in their determinations factors and arguments that are material and relevant or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument.

To the extent there is precedent suggesting that the Commission is not required to address even the main arguments of the parties in its opinions, that precedent is disapproved. See, e.g., *British Steel Corp.* v. *United States,* 593 F.Supp. 405, 414 (Ct. Int'l Trade 1984).

Reasons for change

The statute is amended to reflect more specifically the obligation of the Agreements.

Section 229. Sampling and averaging: Determination of weighted average dumping margin

Averaging

Present law

Section 777A of the Act provides that Commerce may, for the purpose of determining United States price or foreign market value in investigations and reviews "use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise. The authority to select appropriate samples and averages shall rest exclusively with the administering authority, but such samples and averages shall be representative of the transactions under investigation."

Although current U.S. law permits the use of averages on both sides of the dumping equation, Commerce's preferred practice has been to compare an average normal value to individual export prices in investigations and reviews. In part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.

Explanation of provision

Section 229 of H.R. 5110 adds new section 777A(d) to the Act to implement the provisions of the Agreement regarding the use of average normal values and export prices for purposes of calculating dumping margins.

New section 777A(d)(1)(A)(i) provides that in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average or normal values with a weighted-average of export prices or constructed export prices.

In addition to the use of averages, section 777A(d)(1)(A)(ii) also permits the calculation of dumping margins on a transaction-by-transaction basis. Such a methodology would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made. However, given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Committee expects that Commerce will use this methodology far less frequently than average-to-average methodology.

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring. Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison.

In this regard, so that the exceptions are properly applied, the Committee intends that Commerce will continue to require that foreign companies report sales on a transaction-specific basis, and that Commerce will request information on sales to particular customers and regions.

The Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the "investigation phase" of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, the preferred methodology in reviews will be to compare average to individual export prices. New section 777A(d)(2) provides that, when comparing prices of individual export transactions to weighted-average foreign prices, Commerce will limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the Calendar month of the individual export sale. When constructed value is used for normal value, it is normally based on yearly data. However, when costs are rapidly changing, it may be appropriate to use shorter periods, such as quarters or months, which may allow a more appropriate association of costs with sales prices. However, where costs are incurred seasonally, such as in most agricultural products, costs are currently annualized, and the Committee intends that Commerce continue this practice.

Section 229(b) of H.R. 5110 adds section 771(35) to the Act. Section 771(35) defines the terms "dumping margin" and "weighted-average dumping margin" in a manner consistent with existing Commerce regulations.

Section 229(b) H.R. 5110 adds section 771(35)(C) to the Act. This section defines "the magnitude of the margin of dumping" for purposes of the Commission's analysis in preliminary and final investigations (including for the circumstance where such investigations are staggered), changed circumstances reviews and five-year reviews.

Reason for change

Section 773A is added to U.S. law to implement the requirements of Article 2.4.2 of the Agreement.

Sampling

Present law

Under existing practice, Commerce attempts to calculate individual dumping margins for all producers and exporters of merchandise who are subject to an antidumping investigation or for whom an administrative review is requested. As a practical matter, however, Commerce may not be able to examine all exporters and producers, for example, when there is a large number of exporters and producers. In such situations, Commerce either limits its examination to those firms accounting for the largest volume of exports to the United States or employs sampling techniques. Commerce will calculate individual dumping margins for those firms selected for examination and an "all others" rate to be applied to those firms not selected for examination.

Explanation of provision

Section 229 of H.R. 5110 amends section 777A of the Act, which currently authorizes Commerce to use sampling techniques, by adding a new subsection (c), which codifies the current practice of determining, where practicable, an individual weighted-average dumping margin for each known exporter or producer of subject merchandise. This amendment is not intended to change Commerce's normal practice of calculating an individual dumping margin only for the party, whether technically an exporter or producer, that makes the first sale which is for exportation to the United States.

New section 777A(c)(2) provides that where there are large numbers of exporters, producers, importers, or products involved in an investigation, Commerce may limit its examination to: (1) a statistically valid sample of exporters, producers or types of products; or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined. Consistent with the Antidumping Agreement, new section 777A(b) recognizes that the authority to select samples rests exclusively with Commerce, but, to the greatest extent possible, Commerce will consult with exporters and producers regarding the method to be used.

The phrase "statistically valid sample" is intended merely to conform the language of the statute with that of the Antidumping Agreement, and is not a substantive change from the current phrase "generally recognized sampling techniques." Commerce will employ a sampling methodology designed to give representative results based on the facts known at the time the sampling method is designed. This important qualification recognizes that Commerce may not have the type of information needed to select the *most* representative sample at the early stages of an investigation or review when it must decide on a sampling technique.

Reasons for change

The change is made to conform U.S. law more specifically to the provisions of the Agreement.

Section 230. Anticircumvention

Present law

Current U.S. law, section 781 of the Act, requires that the value of imported parts from the country under the order be compared to the value of the finished product and that the difference between the two values be "small," as a prerequisite for an affirmative determination. This has the effect of including third country parts in U.S. value, thereby making it easier for a foreign producer to circumvent an order.

Explanation of provision

Section 230 of H.R. amends existing sections 781(a) and 781(b) of the Act, which address the circumvention of antidumping or countervailing duty orders through the establishment of screwdriver assembly operations in the United States or a third country, respectively. Sections 781(a)(1) and 781(b)(1) (the so-called mandatory factors) focus the inquiry on whether: (1) minor or insignificant assembly or completion is occurring in the United States (or a third country); and (2) the value of the parts imported into the United States (or a third country) from the country subject to the order is a significant proportion of the total value of the finished product.

New sections 781(a)(2) and 781(b)(2) list additional factors Commerce will consider in determining whether the process of assembly or completion is minor or insignificant. No single factor will be controlling.

New Sections 781(a)(2)(E) and 781(b)(2)(E) require Commerce to determine whether the value of the processing performed in the United States (or a third country) represents a small proportion of the value of the finished product.

These new provisions do not establish rigid numerical standards for determining the significance of the assembly (or completion) activities in the United States or for determining the significance of the value of the imported parts or components.

Finally, section 230 of H.R. 5110 renumbers existing sections 781(a)(2) and 781(b)(2) of the Act as sections 781(a)(3) and 781(b)(3), respectively. As under current law, before deciding to include imported parts within the scope of an antidumping or countervailing duty order, Commerce will consider three factors: (1) changes in the pattern of trade; (2) the relationship of the producer of the finished product and the U.S. or third country assembler; and (3) whether imports of parts from the country subject to the order have increased.

With respect to the first factor (changes in the pattern of trade), section 781(a)(3) of the Act also requires Commerce to consider changes in the sourcing patterns of parts used to produce the finished product. With respect to the third factor (increased imports of parts), current law requires Commerce to examine imports occurring after the issuance of the order in question. In the case of certain products, it is possible for a foreign producer to establish a screwdriver operation in the United States or a third country before an initial antidumping or countervailing duty investigation is completed and thereby potentially avoid any finding of circumvention. Therefore, Commerce will examine imports occurring after the initiation of the investigation resulting in the issuance of the order.

Section 230 of H.R. 5110 amends section 781(f) of the Act to require Commerce normally to complete determinations under section 781(f) of whether an antidumping or countervailing duty order is being circumvented within 300 days of initiation. The Committee also intends that Commerce amend its regulations to provide that determinations of whether particular types of merchandise are the subject merchandise of an antidumpinmg or countervailing duty order normally will be completed within 120 days.

Reasons for change

The current statutory provisions on anticircumvention were enacted as part of the Omnibus Trade and Competitiveness Act of 1988 based on the experience Commerce had had with circumvention up to that time. Commerce subsequently encountered new circumvention scenarios that revealed serious shortcomings in the 1988 Act. Given these shortcomings and in light of the Ministerial Decision recognizing the problem of circumvention, it is appropriate, in the context of implementing legislation, to amend the anticircumvention provisions of the statute.

For example, in a number of anticircumvention investigations, the outcome has been determined by the current statutory requirement that the difference between the value of the parts imported into the United States (or into a third country) from the country subject to the order and the value of the finished product be "small." This mechanical, quantitative approach fails to address adequately circumvention scenarios in which only minor assembly is done in the United States (or in a third country), but for various reasons the difference in value is not "small."

Another serious problem is that the existing statute does not deal adequately with the so-called third country parts problem. In the case of certain products, particularly electronic products that rely on many off the shelf components, it is relatively easy for a foreign exporter to circumvent an antidumping duty order by establishing a screwdriver operation in the United States that purchases as many parts as possible from a third country. Given the language of the existing statute, these third country parts cannot be included with the parts imported from the country subject to the order in determining whether the difference between the value of the parts imported from the country subject to the order and the value of the finished product is "small." This has proved to be an elusive standard substantially limiting the effectiveness of the law.

Section 231. Evidence

Treatment of Voluntary Respondents

Present law

There is no comparable provision of current U.S. statute.

Explanation of provision

Section 231 of H.R. 5110 adds section 782(a) to the Act which provides that, in cases where Commerce has limited its examination to selected exporters and producers, it nevertheless will calculate an individual dumping margin for any exporter or producer not selected for examination that provides the necessary information on a timely basis and in the form required. Although Commerce, consistent with Article 6.10.2 of the Agreement, will not discourage voluntary responses and will endeavor to investigate all firms that voluntarily provide timely responses in the form required, in certain cases (including cases involving the same product from multiple countries) where the number of exporters or producers is particularly high, Commerce may decline to analyze voluntary responses because it would be unduly burdensome and would preclude the completion of timely investigations or reviews. Section 782(a) generally codifies existing practice.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Collection, Acceptance, Rejection, and Sharing of Information

Present law

Sections 776 and 777 of the Act contain various requirements concerning the collection and use of information by Commerce and the Commission.

Explanation of provision

General rules.—Under new section 782(c)(1), Commerce or the Commission may modify their respective requests for information if promptly asked to do so by an interested party, to avoid imposing an unreasonable burden on the party. Commerce or the Commission will take due account of difficulties experienced by parties, particularly small companies, in supplying information, and will provide such assistance as the agencies consider practicable. If Commerce or the Commission requests an interested party to provide data in a particular computer medium or language, and the interested party promptly notifies the requesting agency that it does not maintain its records in such a medium or language, and demonstrates that providing the information in the requested manner would result in an unreasonable extra burden, Commerce or the Commission will not insist on the submission of the data in the requested medium or language, but will explore alternative methods to obtain the necessary data in such cases. These might, for example, include the submission of data in an alternate computer medium or language or, where this is not practicable, the Administering Authority may consider sampling.

Section 231(a) of H.R. 5110 redesignates existing section 776(a) of the Act as section 782(b), and continues the requirement that any person providing factual information to Commerce or the Commission must certify as to the accuracy and completeness of that information.

New section 782(d) of the Act requires Commerce and the Commission to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy or explain the deficiency. This requirement is not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit continual clarifications or corrections of information. If subsequent submissions remain deficient or are not submitted on a timely basis, Commerce and the Commission may decline to consider all or part of the original and subsequent submissions. Pursuant to new section 782(f), Commerce and the Commission will provide, to the extent practicable, a written explanation of the reasons for not accepting information.

New section 782(e) of the Act directs Commerce and the Commission to consider deficient submissions if the specified conditions are met.

Sharing of interested party information; definition of interested party; public proprietary records.—Section 231(b) of H.R. 5110 amends section 777(a)(4) of the Act to conform to existing practice and to ensure that interested parties share nonproprietary information. Section 222(g) of H.R. 5110 also amends the definition of interested party in section 771(9) of the Act by adding: (1) trade associations of producers, exporters, or importers; and (2) the government of the exporting country. The latter change reflects the possibility that a country in which merchandise is produced or manufactured may be different from the country from which such merchandise is exported.

Unwarranted claim for proprietary treatment.—Section 226(b) of H.R. 5110 amends section 777(b) of the Act to address situations in which Commerce or the Commission returns information because the person submitting the information has made an unwarranted claim for proprietary treatment. Consistent with current practice, the new language provides the person with an opportunity to submit other information for which a claim of proprietary treatment is warranted or for which the person is willing to accord nonproprietary status. However, to ensure that parties do not use this provision as a vehicle for extending deadlines for the submission of information, the provision makes clear that, absent an extension by the agency, any such submissions of other information must be within the time period established for the initial submission.

Verification of information.—Section 231(a) of H.R. 5110 moves the general requirement that Commerce verify information from section 776(b) of the Act to new section 782(i). To the extent necessary, and as described in the Statement of Administrative Action, Commerce will amend its regulations to implement the specific requirements in Article 6.7 and Annex I of the Antidumping Agreement and Article 12.6 of the Subsidies Agreement concerning the conduct of verifications.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreements.

Determinations on the Basis of the Facts Available

Present law

The current statute mandates use of the best information available (commonly referred to as BIA) if a person refuses or is unable to produce information in a timely manner or in the form required.

Explanation of provision

Section 231(c) of H.R. 5110 amends section 776 of the Act to implement the provisions in the Agreement relating to use of the facts available. New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. The agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.

In the application of this provision, the Committee recognizes that Commerce more frequently relies on secondary information than does the Commission. The fact that corroboration may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference under subsection (b).

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Termination and Revocation

Present law

Under current law and Commerce Department practice, Commerce has the authority to terminate an antidumping investigation and revoke an order if there is no interest on the part of the domestic industry in the continuation of the investigation or order.

Explanation of provision

Section 231(a) of H.R. 5110 adds section 782(h) of the Act authorizing Commerce to terminate an investigation or revoke an order or suspended investigation when producers accounting for substantially all of the production of the domestic like product inform Commerce that they are not interested in the issuance of or continuation of an order. The provision is needed to make clear that Commerce's authority to carry out no-interest terminations/revocations is unaffected by the new provision in section 702(c)(4)(D) and 732(c)(4)(D) prohibiting post-initiation reconsideration of the adequacy of industry support. If the conditions for termination or revocation are met, the fact that a petitioner does not agree with the termination or revocation will not be dispositive. Orders provide relief to the industry—if producers accounting for substantially all of the production want an order revoked, a suspended investigation terminated, or an order not issued, opposition by producers accounting for minimal production should not prevent that result.

Reasons for change

The statute is amended to clarify U.S. law.

Public Comment on Information

Present law

Under current U.S. law and practice, including section 777(e) of the Act, Commerce and the Commission disclose the facts under consideration for their determinations through, *inter alia,* release of verification reports and staff reports, and provide opportunities for interested parties to comment on this information within a specified period of time.

Explanation of provision

Section 231 of H.R. 5110 repeals section 777(e) of the Act and adds section 782(g) in its place to implement the requirement that all interested parties be informed of the essential facts under consideration that form the basis for a determination in sufficient time for them to defend their interests.

New section 782(g) restates the existing right of interested parties to comment on information submitted to the agencies, but requires that the record be closed prior to the time the agency's determination is made, and that the parties to the proceeding be permitted a final opportunity to comment on all information obtained by the agency upon which the parties have not yet had an opportunity to comment. All final comments properly filed by the date reasonably specified by the agency will be accepted for the record, but the agencies will not obtain or accept for the record new factual information, argument, or comment after this date. The disclosure requirement in new section 782(g) applies to both public information and business proprietary information.

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Section 232. Antidumping petitions by third countries

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

Section 232 of H.R. 5110 adds section 783 to the Act to incorporate the provisions of Article 14 of the Antidumping Agreement, and establish a framework for taking antidumping actions on behalf of a third country. Current U.S. law authorizes the U.S. Trade Representative to request that other countries take action against dumping in their markets that injures U.S. exporters, but does not provide express authorization to Commerce or the ITC to take action in response to similar requests by other governments.

Reasons for change

Section 773 is added to U.S. law to implement the requirements of Article 14 of the Agreement.

Section 233. Conforming amendments

Section 233 makes conforming amendments to U.S. statute to reflect *inter alia* the changes in nomenclature made by the other amendments in H.R. 5110.

Section 234. Application to Canada and Mexico

Consistent with Article 1902 of the North American Free Trade Agreement and section 408 of the North American Free Trade Agreement Implementation Act, section 234 of H.R. 5110 provides that the amendments made by Title II of the Uruguay Round Agreements Act will apply with respect to goods from Canada and Mexico.

Reports

The Office of the United States Trade Representative will prepare and submit to the Committee on Ways and Means and the Committee on Finance an annual report on foreign antidumping and countervailing duty actions against exports from the United States for the most recent year for which data are available. The Committee's intent in requesting this report is to ensure a current source of information on the impact of antidumping actions against U.S. exporters and to ensure that such actions are not inconsistent with the obligations of the Agreement.

The Department of Commerce will prepare and submit to the Committee on Ways and Means and the Committee on Finance a report on the efficiency, effectiveness, and impact on exporters, importers, and domestic industries of different antidumping and countervailing duty assessment systems, and estimated duty collection. The report will be submitted no later than twelve months after the effective date of the legislation except that the portion of the report dealing with estimated duty collection will be submitted no later than six months after such date. With respect to the report on estimated duty collection, Commerce will also review a specific proposal to revise the estimated duty collection procedure and convey its views on that proposal to the Committee within 60 days of the date of enactment. The Committee intends to review this issue when Commerce completes its overall report.

SUBTITLE B—SUBSIDIES PROVISIONS

NOTE.—Certain amendments to the countervailing duty law are either required or appropriate to implement the Subsidies Agreement. Except where otherwise noted, H.R. 5110 amends Title VII of the Act of 1930 (the Act). Most of the amendments necessary or appropriate to implement the procedural provisions of the Subsidies Agreement are described in the portion of this Report devoted to describing amendments to U.S. law made to implement the Antidumping Agreement. Other amendments are described below.

Section 251. Countervailable subsidy

Definition of Subsidy

Present law

Section 771(5)(A) defines the term subsidy under current U.S. law to have the same meaning as the term "bounty or grant" as that term is used in section 303 of the Act and includes, but is not limited to, the following: any export subsidy described in the illustrative list of export subsidies to the Tokyo Round Subsidies Agreement, and domestic subsidies as specified at subsection (ii).

Explanation of provision

Section 251 of H.R. 5110 amends section 771(5)(A) of the Act in regard to the basic definitions of the terms "subsidy" and "countervailing subsidy." With respect to the term "subsidy," in general, the Committee intends that the definition of "subsidy" will have the same meaning that administrative practice and courts have ascribed to the term "bounty or grant" and "subsidy" under prior versions of the statute, unless that practice or interpretation is inconsistent with the definition contained in the bill.

New section 771(5)(B) provides that a subsidy exists where a government or any public body within the territory of a country: (1) provides a financial contribution; (2) makes payments to a funding mechanism for purposes of providing a financial contribution, or entrusts or directs a private body to provide a financial contribution, where the provision of such a contribution normally would be vested in the government and the practice does not differ in substance from practices normally followed by governments; or (3) provides any form of income or price support in the sense of Article XVI of the GATT 1994; and a benefit is conferred through one of these enumerated acts. This definition tracks the one used in the Subsidies Agreement.

The Subsidies Agreement specifically states that the term "financial contribution" includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Committee's view that the term "private body" is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided "directly or indirectly" by a government. Accordingly, the Committee intends that the "entrusts or directs" standard shall be interpreted broadly.

In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. *(See, e.g.,* Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and certain Steel Products from Korea). The specific manner in which the government acted through the private party to provide the benefit varied widely in the above cases. Commerce has found a countervailing subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.

In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Committee intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Committee's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and section 771(5)(B)(iii) encompass indirect subsidy practices like those that Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under section 771(5)(B)(iii) has been met.

Section 251 of H.R. 5110 amends section 771(5)(C) of the Act to provide that in determining whether a subsidy exists, Commerce is not required to consider the effect of the subsidy.

Section 771(5)(D) of the Act lists the four broad generic categories of government practices that constitute a "financial contribution." The examples of particular types of practices falling under each of the categories are not intended to be exhaustive. The Committee believes that these generic categories are sufficiently broad so as to encompass the types of subsidy programs generally countervailed by Commerce in the past, although determinations with respect to particular programs will have to be made on a case-by-case basis.

Section 771(5)(E) of the Act provides the standard for determining the existence and amount of a benefit conferred through the provision of a subsidy. It states that "a benefit shall normally be treated as conferred where there is a benefit to the recipient," providing examples of how a benefit is to be established under various types of subsidy instruments. Thus, subparagraph (E) reflects the "benefit-to-the-recipient" standard which long has been a fundamental basis for identifying and measuring subsidies under U.S. CVD practice, and which is expressly endorsed by Article 14 of the Subsidies Agreement. In using the word "normally" in this subparagraph, the Committee intends only to indicate that in the case of certain types of subsidy programs, such as export insurance schemes, the use of the benefit-to-the-recipient standard may not be appropriate. The use of "normally" should not be construed as suggesting that, in addition to identifying the benefit to the recipient, Commerce should or must consider the effect of the subsidy; section 771(5)(C) already makes this clear. However, neither section 771(5)(C) nor section 771(5)(E) detract from the existing requirements of section 771A(a) (2) and (3) for determining when an upstream subsidy is "passed through" to a downstream producer.

With respect to the provision of goods or services, current law relies on a standard of "preferentiality" to determine the existence and amount of a benefit. Section 771(5)(E)(iv) of the Act replaces this standard with the standards from Article 14 of the Subsidies Agreement—"less adequate remuneration" (in the case of the provision of goods or services) and "more than adequate remuneration" (in the case of the procurement of goods).

In determining a benefit from a loan guarantee, Article 14(c) of the Subsidies Agreement specifies that Commerce is to compare the difference in interest payments by a firm on a government-guaranteed loan and a loan not guaranteed by the government.

Unlike existing section 771(5)(A)(i), new section 771(5) does not incorporate the Illustrative List of Export Subsidies into the statute. It is the committee's intent that Commerce adhere to the Illustrative List except where the List is inconsistent with the principles set forth in H.R. 5110, in particular, the benefit to recipient standard for identifying and measuring subsidies.

Article 14 of the Subsidies Agreement provides that any method used to calculate the benefit to the recipient conferred pursuant to a subsidy must be provided for in national legislation or implementing regulations. To comply with this article, Commerce will issue regulations setting forth the details of the methodologies used to identify and measure the benefit of a subsidy.

Section 771(5)(F) of the Act provides that a change in the ownership of "all or part of a foreign enterprise" (i.e., a firm or a division of a firm) or the productive assets of a firm, even if accomplished through an arm's-length transaction, does not by itself require Commerce to find that past countervailable subsidies received by the firm no longer continue to be countervailable. For purposes of section 771(5)(F), the term "arm's-length transaction" means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.

Section 771(5)(F) is being added to the Act to clarify that the sale of a firm at arm's-length does not automatically, and in all cases, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets to an unrelated party. Consequently, it is imperative that the implementing bill correct and prevent such an extreme interpretation.

The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Committee's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

The existing definition of "country" in section 771(3) is retained so as to include actions by governments at the subnational level, such as state or provincial governments.

Reasons for change

The changes are being made to conform U.S. statute more specifically to the provisions of the Agreement.

Countervailable Subsidy

Present law

As noted above, current U.S. law uses the terms "subsidy" and "bounty or grant." There was no need under existing U.S. law to include the term "countervailable subsidy" since all subsidies are countervailable provided they satisfy the criteria in the law and current U.S. law does not contain any normative categories of nonactionable subsidies.

Explanation of provision

Section 251(a) of H.R. 5110 adds a new section 771(5)(A) defining the term "countervailable subsidy." With the exception of particular types of subsidies which are non-countervailable pursuant to section 771(5B), a subsidy is countervailable if it (a) constitutes a subsidy under the basic definition in section 771(5), and (b) is specific within the meaning of section 771(5A). In order to conform to this new definition, where appropriate to the context, the term "countervailable subsidy" is substituted for the term "subsidy" where the latter term currently appears in other provisions of Title VII of the Act.

Reasons for change

The section is added to reflect the distinction in the Subsidies Agreement between actionable and non-actionable subsidies. Because existing U.S. law does not distinguish subsidies on this basis, it is necessary to amend the Act to reflect this distinction.

Specificity

Present law

Current U.S. law contains a "special rule" on specificity, which provides that Commerce in each investigation shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, or the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

Explanation of provision

Section 771(5A) of the Act implements the provisions of Article 2 of the Subsidies Agreement dealing with specificity. Article 2 essentially reflects U.S. practice, so the substance of the specificity test in section 771(5A) generally reflects existing law and practice.

Section 771(5A)(A) of the Act provides that export subsidies and import substitution subsidies are deemed to be specific. "Export subsidies" are defined as those subsidies which are contingent in law or in fact, whether solely or as one of several other conditions, upon export performance. This definition is more expansive than the one used in existing U.S. law and practice. Commerce intends to issue regulations, based on Article 3.1(a) and note 4 of the Subsidies Agreement, which will elaborate on the criteria for identifying export subsidies on the basis of this expanded definition. "Import substitution subsidies" are defined in section 771(5A)(C) as those subsidies which are contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

Specificity of Domestic Subsidies.—Section 771(5A)(D) of the Act replaces section771(5)(B) with respect to the issue of whether a domestic subsidy is specific. The Statement of Administrative Action describes in detail how the Administration intends to administer section 771(5A)(D). The Committee supports the Administration's intent in this respect.

Regional Specificity.—Section 771(5A)(D)(iv), which corresponds to Article 2.2 of the Subsidies Agreement, essentially codifies Commerce's current "regional specificity test." Under this test, subsidies granted by a state or province that are not limited to a specific enterprise, industry or group thereof within the state or province are not considered specific, and, therefore, are not countervailable. However, subsidies provided by a central government to particular regions (including a province or a state) are specific regardless of the degree of availability or use within the region. Likewise, state and provincial subsidies that are limited to particular regions within the state or province are specific.

Evidentiary Standard.—Article 2.4 of the Subsidies Agreement requires that specificity determinations "be clearly substantiated on the basis of positive evidence." In the view of the Committee, the requirements of Article 2.4 are more than satisfied by section 516A(b)(1)(B) of the Act, which requires that determinations be supported by substantial evidence on the record. In addition, Article 2.4 does not affect the ability of Commerce, pursuant to Article 12.7 of the Subsidies Agreement, to make specificity determinations on the basis of the facts available where a foreign firm or government refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.

Reasons for change

The change is made principally to reflect in section 771(5A) the organizational structure of Article 2 of the Subsidies Agreement, which is clearer than that of the existing law.

Green Light Subsidies

Present law

Current U.S. law does not contain any normative categories of nonactionable subsidies.

Explanation of provision

Section 771(5B) sets forth the criteria for determining whether industrial research and pre-competitive development subsidies, subsidies to disadvantaged regions, and subsidies for adaptation of existing facilities to meet new environmental requirements, respectively, qualify as non-countervailable. These criteria correspond to those found in Article 8.2(a)-(c) of the Subsidies Agreement.

In some instances, the terms and conditions set forth in the Subsidies Agreement for determining whether a subsidy is non-countervailable are expressed ambiguously. To prevent the possibility that such general terminology could open a door to the abuse of the green light provisions, the Committee believes that certain terms and conditions require clarification as to their intended interpretation and application.

Industrial Research and Pre-Competitive Development.—With respect to subsidies for industrial research and pre-competitive development activity, it is critical to draw a careful, sharp distinction between genuinely pre-competitive activity and later-stage development and production aid. In this regard, Commerce should not accord green light status to assistance for pre-competitive development activity unless the pre-competitive nature of the research is well established. To that end, the Statement of Administrative Action contains guidelines that the Administration intends to use in analyzing claims that assistance is for pre-competitive development activity rather than for development or production support. The Committee endorses use of these guidelines.

It is also important that there be strict adherence to the Subsidies Agreement's requirements as to which research costs may be assisted. For example, the use of equipment or buildings for any purpose other than the research for which green light status was sought will disqualify such cost items from coverage under the green light provisions. In the same vein, the term "other operating costs" as used in section 771(5B)(B)(i)(V) should be viewed as encompassing only those items which are directly consumed in the non-actionable research activity.

Disadvantaged Regions.—The green light provision governing assistance for disadvantaged regions also must be strictly construed in order to prevent circumvention of the intent of the provision. Footnote 33 to Article 8.2(b) of the Subsidies Agreement states that "[a] 'general framework of regional development' means that regional subsidy programs are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region." Therefore, to be non-countervailable, the government assistance must be directed both by law and in practice toward the development of the region as a whole. This requirement is further reinforced by the stipulation that the assistance cannot be provided in a "specific" manner to an enterprise, industry, or group of enterprises or industries located within eligible regions. Aid which is provided to a limited number of recipients; or which is provided in a disproportionate manner to a specific enterprise, industry or group thereof; or which is predominantly used by a specific enterprise, industry or group thereof within the regions eligible for green light aid, will be considered as fully countervailable.

At the same time, evidence indicating that an "eligible region" was created for purposes of the regional development program, and that did not otherwise have an independently discernible economic and administrative identity, would be sufficient grounds to deny non-countervailable treatment to any assistance to that region.

Sections 771(5A)(C)(ii)(I) and (II) refer to percentage-based indicators of economic development (per capita income, household per capita income, per capita gross domestic product, and unemployment rate) that are gauged in relation to averages for "the country subject to investigation or review." Where a CVD investigation or review involves a member of a customs union, the term "country" as used in these sections will refer either to the member state or the union as a whole depending on the structure of the regional assistance program. It is possible to have an investigation concerning a product from Luxembourg (for example) which includes investigation of a subsidy received under a regional development program administered by the European Union and available to disadvantaged regions throughout the Union. In such a situation, the appropriate measures of economic development would be determined on the basis of averages for the EU as a whole, as opposed to averages based exclusively on conditions in Luxembourg.

The Committee endorses use of the guidelines described above and in the Statement of Administrative Action.

Environmental Subsidies.—Section 771(5B)(D) provides that a non-countervailable environmental subsidy may be provided only to assist an enterprise in meeting "new environmental requirements that are imposed by statute or by regulation, and that result in greater constraints and financial burdens on the recipient of the subsidy." In the Committee's view, strict application of these requirements is essential in order to limit the scope of the provision to only those situations that clearly warrant non-countervailable treatment. In this regard, the Statement of Administrative Action contains a detailed discussion of the key terms governing application of this provision. The Committee endorses that discussion.

Green light status can be achieved in two different ways: (1) a country can notify a subsidy program before its implementation pursuant to Article 8.3 of the Subsidies Agreement; or (2) a country can decline to notify, but can establish in the context of a CVD or WTO dispute settlement proceeding that a particular subsidy satisfies all of the criteria for non-countervailable treatment. (The latter method was added at the insistence of the United States).

Section 771(5B)(A) establishes a general rule regarding those subsidies for which there has not been notification pursuant to Article 8.3. Only Subsidies Agreement countries, as defined at section 701(b) of the Act, can obtain non-countervailable status.

In addition, section 771(5B)(A) provides that in order to obtain non-countervailable status, Commerce must determine that all of the criteria of subparagraphs (B), (C), or (D) as the case may be, have been satisfied. Thus, for example, if Commerce found that an environmental subsidy accounted for 21 percent of the cost of adaptation, the entire subsidy would be countervailable in full.

Section 771(5B)(E) contains a special rule for green light subsidies notified pursuant to Article 8.3 of the Subsidies Agreement. In accordance with footnote 37 of the Subsidies Agreement, subparagraph (E)(i) provides that such subsidies may not be investigated or reviewed by Commerce. However, it is important that the countervailing duty remedy be applied quickly where violations of Article 8 are determined to exist. Section 281(e)(1)(D) requires the Office of the U.S. Trade Representative (USTR) to notify Commerce whenever a green light subsidy has been challenged successfully pursuant to the challenge procedures of Article 8.4 or 8.5 of the Subsidies Agreement. Such subsidies are countervailable under section 771(5B), provided, of course, that the subsidy is specific within the meaning of section 771(5A). The Committee intends that the Administration use the green light challenge procedures in the Subsidies Agreement aggressively in order to ensure that Article 8 is not abused.

Section 771(5B)(F) implements Article 13(a) of the Agreement on Agriculture. It provides that domestic support measures provided with respect to agricultural products listed in Annex 1 to the Agreement on Agriculture, shall be non-countervailable if Commerce determines that the measures conform fully to the provisions of Annex 2 of the Agreement on Agriculture.

Reasons for change

The changes are necessary to conform U.S. law to the Agreement.

Provisional Application

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

Under Article 31 of the Subsidies Agreement, Article 8 expires in five years unless there is an agreement to extend its application. Section 771(5B)(G)(i) provides that the United States can agree to such an extension only if Congress passes legislation approving the extension. Specifically, it provides that subparagraphs (B)–(E) shall cease to have any effect 66 months after the WTO Agreement enters into force unless the provisions of those subparagraphs are extended pursuant to section 282(c) of H.R. 5110.

Pursuant to Article 13 of the Agreement on Agriculture, Annex 2 domestic support measures are non-actionable only for the duration of the implementation period, which, pursuant to Article 1(f) of that Agreement, is the nine-year period commencing in 1995. Because the precise date on which the implementation period expires will vary from member to member, section 771(G)(ii) provides that section 771(F) shall cease to have effect as of the date designated by USTR for each WTO member, and that USTR shall notify Commerce of such dates.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 261. Repeal of section 303

Present law

Section 303 of current U.S. law applies in the case of a country that is not a "country under the Agreement." Section 303 also contains its own definition of subsidy.

NOTE.—Under existing law, in the case of a country that is a "country under the Agreement," countervailing duties may not be imposed unless the U.S. International Trade Commission (Commission) finds that a domestic industry is materially injured by reason of subsidized imports. A "country under the Agreement" can be a country (1) that has signed the Tokyo Round Code; (2) that has assumed obligations which are substantially equivalent to those imposed by the Tokyo Round Code; or (3) with which the United States has a treaty that requires unconditional most-favored-nation treatment with respect to articles imported into the United States. In addition, section 303 of the Act also imposes an "injury test" in the case of imports of duty-free merchandise from GATT Contracting Parties. Countries that are not signatories to the Tokyo Round Code, or that have not entered into agreements of the kind described in (2) or (3) above, normally would not receive an injury test in U.S. CVD investigations, even if the country were a GATT Contracting Party.

Under the WTO Agreement and the Subsidies Agreement, all WTO members are entitled to an injury test in CVD investigations. Therefore, existing law must be amended.

Explanation of provision

Section 261 of H.R. 5110 repeals section 303 of the Act.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 262. Imposition of countervailing duties

Present law

Section 701(a) of current U.S. law applies only to imports from countries determined by Commerce to be "countries under the Agreement." Section 701(b) defines "countries under the Agreement" for purposes of current U.S. law. Section 701(c) of the Act currently authorizes the U.S. Trade Representative to revoke the status of a foreign country as a "country under the Agreement."

Explanation of provision

Section 262 of H.R. 5110 amends section 701(a) of the Act to provide that the injury test is applicable only to merchandise imported from a "Subsidies Agreement country." Section 701(b), in turn, is amended by replacing the definition of "country under the Agreement" with a new definition of "Subsidies Agreement country."

Section 701(c) of the Act, which, as noted, currently authorizes the U.S. Trade Representative to revoke the status of a foreign country as a "country under the Agreement," is repealed. Countries with which the United States negotiated bilateral commitments to phase out the use of export subsidies in conjunction with that country's accession to the Tokyo Round Code will have to become members of the WTO in order to maintain their right to an injury test under U.S. countervailing duty law.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 263. De minimis countervailable subsidy

Present law

Under existing Commerce Department regulations, aggregate subsidies at a de minimis level (0.5 percent) are noncountervailable. This provision is not contained in statute.

Explanation of provision

Section 263 of H.R. 5110 creates: (1) new section 703(b)(4)(A), to provide that Commerce shall disregard as de minimis net countervailable subsidies determined to be less than one percent ad valorem in the case of merchandise from developed countries; (2) new section 703(b)(4)(B) to provide that, in the case of developing countries, subsidies determined not to exceed two percent ad valorem are de minimis; and (3) new section 703(b)(4)(C) to provide that in the case of merchandise from certain developing countries, subsidies not in excess of three percent shall be regarded as de minimis.

Two categories of developing countries are eligible for this third de minimis standard. The first category consists of the countries identified in Annex VII of the Subsidies Agreement. For them, this special de minimis standard will exist for no longer than eight years after the date the WTO Agreement enters into force, corresponding to the period within which developing countries are supposed to eliminate their export subsidies. The second category consists of developing countries that, according to a notice from USTR to Commerce, have eliminated their export subsidies on an expedited basis pursuant to Article 27.11 of the Subsidies Agreement. The extension of a higher de minimis standard to this second category of countries provides an incentive for them to eliminate their export subsidies expeditiously. Accordingly, for these countries this special de minimis standard will exist for not longer than eight years after entry into force of the WTO, but only for so long as they continue not to grant any export subsidies.

As under existing practice, Commerce would apply these de minimis standards on an aggregate, rather than a program-by-program, basis.

The de minimis requirements of Articles 11.9, 27.10 and 27.11 of the Subsidies Agreement are applicable only to initial CVD investigations. Thus, under section 705(a)(3) these standards are not applicable to reviews of CVD orders. In such reviews, the Committee intends that Commerce will continue its present practice of waiving the collection of estimated deposits if the deposit rate is below 0.5 percent ad valorem, the existing regulatory standard for de minimis. Because the United States accepted slightly higher de minimis thresholds for developing countries in return for the more stringent subsidies disciplines embodied in the Subsidies Agreement, the bill makes the new de minimis standards of two and three percent applicable only in investigations involving merchandise from a Subsidies Agreement country which qualifies for one of these special de minimis standards under Article 27 of the Agreement and section 703(b)(4) (B) or (C) of the Act.

Conversely, the new de minimis standard of one percent applies to all other countries, irrespective of whether the country is a Subsidies Agreement country, as do the new numerical standards for determining negligible imports in investigations involving countries which are not developing countries. This is required in order to ensure that the conditions necessary for a cumulative injury analysis that are set forth in Article 15.2 of the Agreement are respected in any investigation involving a Subsidies Agreement country.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 264. Determination of countervailable subsidy rate

Present law

Section 703(d)(1) of the Act currently provides that Commerce shall, if its preliminary CVD determination is affirmative, order the suspension of liquidation of all entries of merchandise subject to the determination. Section 703(d)(2) further provides that Commerce order the posting of a cash deposit, bond, or other security, as Commerce deems appropriate, for each entry of the merchandise concerned equal to the estimated amount of the net subsidy.

Explanation of provision

Section 264(a) of H.R. 5110 amends section 703(d)(1) of the Act to provide that when Commerce issues an affirmative preliminary CVD determination, it will determine an individual countervailable subsidy rate to be applied to each exporter and producer individually investigated and an "all-others" rate to be applied to those exporters and producers who were not individually investigated. Where Commerce has used the approach authorized under section 777A(e)(2)(B), Commerce would apply a country-wide rate to all firms. Section 705(c)(1)(B) would apply similar rules to affirmative final CVD determinations.

Section 264(b)(2) of H.R. 5110 amends section 705(c) of the Act to establish rules for calculating the all-others rate and the country-wide subsidy rate.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 265. Assessment of countervailing duty

Present law

Section 706(a)(2) of the Act provides that a countervailing duty order will presumptively apply to all merchandise of the class or kind exported from the country investigated, except if Commerce determines that there is a significant differential between companies receiving subsidies benefits or if a state-owned enterprise is involved, in which case the order may provide for differing countervailing duties.

Explanation of provision

Section 265 of H.R. 5110 amends section 706(a) of the Act by striking paragraph (2) of that section and renumbering paragraphs (3) and (4) as paragraphs (2) and (3).

Reasons for change

The statute is amended to reflect more specifically the obligations of the Agreement.

Section 266. Nature of countervailable subsidy

Present law

Section 771(7)(E)(i) provides that in determining whether there is a threat of material injury, the Commission shall consider such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement) provided by a foreign country and the effects likely to be caused by the subsidy.

Explanation of provision

Section 266 of H.R. 5110 amends section 771(7)(E)(i) to change the reference from "an export subsidy" to "a subsidy described in Article 3 or 6.1 of the Subsidies Agreement." Article 3 covers prohibited subsidies, including export subsidies, while Article 6.1 covers subsidies that are presumed to cause serious prejudice, within the meaning of the Subsidies Agreement.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 267. Definition of developing and least-developed countries

Present law

Current U.S. countervailing duty law does not contain a definition of developing or least-developed countries.

Explanation of provision

Section 267 of H.R. 5110 adds a new paragraph 771(36) to the Act, authorizing USTR to designate which countries are developing and least developed countries for purposes of the CVD law. In the case of developing countries, it authorizes USTR to use such economic, trade and other factors as may be deemed appropriate, including the level of economic development, per capita GNP and the country's share of world trade.

The Committee intends that USTR use factors that will ensure that the *de minimis* standard and other differential provisions applicable to developing countries in CVD proceedings are available only to economies that truly merit "developing country" status. The Committee further intends that USTR ensure that the designation procedure enables Commerce, the Commission, and all interested parties reasonably to determine the status to be accorded any given country at the outset, and during the course, of a proceeding. The Committee understands that, consistent with the position taken by the United States during the negotiations, USTR will not designate as developing countries those countries that more properly should be considered as newly industrialized countries, such as Hong Kong, Korea and Singapore.

Reasons for change

The change is necessary to conform U.S. law to the Agreement. Traditionally in GATT, the designation of a country as developing is by self-election. However, using self-election in the context of CVD proceedings is inappropriate given the unacceptable risk of abuse.

Section 268. Upstream subsidies

Present law

Under existing law, only domestic subsidies bestowed on the upstream product are capable of being treated as upstream subsidies. In light of the rearrangement of the statutory definition of subsidy and the addition of the new category of import substitution subsidies, it is necessary to amend this definition.

Explanation of provision

Section 268 of H.R. 5110 amends section 771A(a) of the Act to establish the criteria for determining the existence of an upstream subsidy (*i.e.*, a subsidy bestowed on an input which is passed through to a downstream product). Specifically, section 771A provides that any countervailable subsidy, other than an export subsidy, bestowed on an input used in the manufacture or production of the subject merchandise is capable of constituting an upstream subsidy.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 269. Determination of countervailable subsidy rate

Present law

Under existing section 706(a)(2), Commerce normally calculates a country-wide rate applicable to all exporters unless there is a significant differential in CVD rates between companies or if a state-owned company is involved.

Explanation of provision

Section 269 of H.R. 5110 repeals section 706(a)(2). It eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated. Section 777A(e)(2) provides for an exception from this general rule in cases involving a large number of exporters or producers.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

Section 270. Conforming amendments

This section makes conforming amendments necessary or appropriate to implement the Subsidies Agreement into U.S. law.

Section 271. Special rules for injury investigations for certain section 303 countervailing duty orders and investigations

Present law

As discussed above, under current U.S. law, countries become entitled to an injury test under U.S. countervailing duty law only if they meet the criteria established at section 701 of the Act.

Explanation of provisions

Under the Subsidies Agreement, all Subsidies Agreement countries are entitled to an injury test in CVD investigations, and countervailing duties may not be levied absent an affirmative determination of injury. In order to implement this obligation, the bill provides for an injury test with respect to outstanding CVD orders issued under former section 303(a) of the Act, pending CVD investigations under section 303(a)(1) of the Act, and those pending CVD investigations under section 303(a)(2) as to which no injury test previously was required (section 303 cases).

Outstanding Orders

Injury Determination.—Section 271(a) of the bill adds a new section 753, modeled on sections 102 and 104 of the Trade Agreements Act of 1979, to create a mechanism for providing an injury test for outstanding CVD orders issued under former section 303(a). An injury determination will be provided only when a country becomes a Subsidies Agreement country. Thus, countries eligible for original membership in the WTO will not be entitled to an injury determination under this section during the two-year grace period until they actually have become members.

For CVD orders which are in effect on the date a country becomes a Subsidies Agreement country, a domestic interested party may request that the Commission initiate an investigation to determine whether an industry in the United States is likely to be materially injured by reason of imports of the merchandise subject to the CVD order if the order is revoked.

Liquidation of Entries.—Under section 753(a)(4), liquidation of entries subject to a CVD order is suspended automatically on (1) the date on which the country becomes a Subsidies Agreement country, or (2) where a CVD order is issued pursuant to court order, the date of issuance of the CVD order. Under section 753(b)(4), if the Commission does not receive a request for an injury determination within the stipulated six-month period, Commerce will revoke the order and refund, with interest, any estimated countervailing duties collected during the period liquidation was suspended under this section.

Standard for Commission Determination.—In determining whether an industry in the United States is likely to be materially injured by reason of imports of merchandise subject to a CVD order if the order is revoked, the Commission will perform a prospective analysis similar to that required in sunset injury reviews under section 751(c). To the extent relevant, the Commission generally will consider the factors set forth in section 751(c) regarding the likelihood of injury.

Procedures and Schedules.—Section 753(b) provides procedures and schedules for Commission and Commerce action. Under section 753(b)(1)(A), the Commission would apply the normal procedures applicable to final CVD investigations, except as otherwise provided in this section. Section 753(b)(1)(B) requires the Commission to complete its investigation of a section 303 case within one year to the extent possible. In general, however, the Committee expects that such investigations will take less than one year to complete. The phrase "to the extent possible" is used to clarify that the Commission has discretion to take the overall number of investigations into account in setting the schedule for a particular investigation.

Section 753(b)(1)(C) provides special rules for section 303 cases in which an injury investigation under this section is requested within one year after the date on which the WTO Agreement enters into force with respect to the United States. The section gives the Commission the flexibility to stagger the commencement of these investigations in a manner that permits the completion of all such cases within four years from the date of entry into force of the WTO Agreement with respect to the United States.

Effect of Commission Determination.—Under section 753(b)(3), if the Commission's determination is affirmative, the CVD order will remain in place, and the date of publication of the Commission's affirmative determination will be deemed to be the date of issuance of the order for purposes of future sunset reviews. If the Commission's determination is negative, Commerce will revoke the order; order liquidation, without regard to countervailing duties, of entries made on or after the date on which liquidation was suspended pursuant to section 753(a)(4); and order the refund, with interest, of any estimated duties deposited on such entries.

Section 753(d) requires Commerce and the Commission to publish in the Federal Register notice of any initiation, determination, or revocation made pursuant to section 753. In addition, section 271(b) of the bill amends section 516A of the Act to provide for judicial review of such determinations.

Expedited Sunset Review Upon Request.—Section 753(e) permits the domestic interested party requesting an injury determination for a section 303 case also to request that "sunset reviews" under section 751(c) of outstanding antidumping and CVD orders involving the same or comparable subject merchandise be expedited so that these reviews are conducted contemporaneously with the investigation for the section 303 case.

Section 753(e)(2) allows the Commission to cumulatively assess the volume and effect of imports of the merchandise subject to a sunset review and an investigation of a section 303 case. The Committee does not view this subsection as broadening the legal basis for cumulation. In determining whether cumulation is appropriate in these cases, the Commission should be guided, to the extent appropriate, by its practice regarding cumulation in the context of sunset reviews under section 751(c). If the Commission determines that cumulation is not warranted under the standards established in section 752(a)(7), as added by the implementing bill, the commission still would complete the sunset review under the standards of section 751(c).

Section 753(c) establishes transition rules for pending and suspended CVD investigations under section 303.

Reasons for change

The special review procedure is to ensure that outstanding U.S. countervailing duty orders and pending investigations are administered in a manner consistent with the terms of the Subsidies Agreement.

Section 281. Subsidies enforcement

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

The Committee believes that, to derive the maximum benefit from the Subsidies Agreement, the United States must exercise is rights under the Agreement vigorously, intelligently, and efficiently. Part 4 of Subtitle B to Title II of H.R. 5110 provides the means of enforcement of United States rights under the Subsidies Agreement, establishes a mechanism for reviewing the operation of provisions in the Agreement relating to green light subsidies, and makes changes to the Act to ensure prompt and effective implementation of successful dispute settlement proceedings brought under Article 8 and other provisions of the Agreement.

Coordination of Subsidies Enforcement Efforts.—The Committee believes that the United States should coordinate its use of the CVD law with its new rights under the Subsidies Agreement. Section 281(a) of H.R. 5110 makes Commerce responsible for coordinating the countervailing duty and multilateral subsidies enforcement efforts. Commerce's primary mission will be to assist the private sector by monitoring foreign subsidies and identifying instances of subsidization that can be remedied under the provisions of the Subsidies Agreement.

To ensure that the United States is able to take full advantage of its rights under the Subsidies Agreement, section 281(g) of the bill provides that Commerce may request the assistance of, and information from, other agencies of the Federal government. It is expected that agencies such as the Department of State (particularly through U.S. embassies abroad), as well as other parts of Commerce, such as the U.S. and Foreign Commercial Service, would have information relevant to subsidies enforcement and monitoring.

Red Light Subsidies.—Under section 281(b) of H.R. 5110, if, during a CVD proceeding, Commerce determines that a WTO member government has bestowed a subsidy the use of which it prohibited by the Subsidies Agreement, Commerce will inform USTR of that fact, along with the information on which Commerce's determination was based. In addition, if, outside the context of a CVD proceeding, a domestic interested party believes that a WTO member government has provided a subsidy prohibited by the Subsidies Agreement, that party can submit information to Commerce for an evaluation of its claim. The specific procedures for addressing such subsidies are provided at section 281(b) and elaborated in greater detail in the Statement of Administrative Action.

Section 281(d) of H.R. 5110 directs USTR to make its decision on initiation of an investigation "as expeditiously as possible." Because Commerce already will have analyzed the matter, it is expected that in virtually all cases the decision on whether to initiate should take less than the 45 days permitted under section 301. Where an investigation is initiated, the dispute settlement mechanism under the Subsidies Agreement and the WTO will be pursued, as provided in section 301. Where a foreign country does not implement a dispute settlement decision within the allotted time and the DSB authorizes retaliation, section 301 provides the needed domestic authority to carry out that retaliation.

The Committee does not intend to impose undue burdens or overly formalistic requirements on domestic industries seeking to obtain relief from subsidized competition through the multilateral process. For that reason, the bill states that interested parties may "request" that Commerce determine whether there is a reason to believe there is a violation of the Agreement. The Committee intends merely that domestic industries provide Commerce with sufficient information in order to ensure that multilateral procedures are not invoked in frivolous or meritless cases.

Yellow Light and Dark Amber Subsidies.—Section 281(c) of H.R. 5110 contains similar procedures in the case of subsidies that are actionable under the Subsidies Agreement, except that to the extent information is derived from CVD proceedings, Commerce would notify USTR only where it determined that there was reason to believe that a subsidy was of a type described in Article 6.1 of the Subsidies Agreement (i.e., a "dark amber" subsidy). The specific procedures for addressing such subsidies are provided at section 281(c) and elaborated in greater detail in the Statement of Administrative Action.

Green Light Subsidies.—The Committee intends that the Administration use the notification process aggressively to police the operation of the green light provisions. Under section 281(e)(1) of H.R. 5110, Commerce would be the focal point for enduring that (1) foreign governments do not abuse the limited privilege accorded by the Subsidies Agreement to use green light subsidies, and (2) the United States takes full advantage of its rights under Article 8. The specific procedures for addressing such subsidies are provided at section 281(e)(1) and elaborated in greater detail in the Statement of Administrative Action.

With regard to U.S. programs believed to be consistent with the green light criteria, the decision as to which programs to notify will be made by USTR after consultation with: (1) the Departments of Commerce and Defense and other interested agencies; (2) interested private parties; and (3) the Senate Finance Committee, the House Ways and Means Committee, and other appropriate Congressional Committees.

Article 9 Procedures.—In order to take advantage of Article 9 of the Agreement, which allows a member to challenge a green light subsidy that has serious adverse effects on a domestic industry, section 281(e)(2) of the bill provides that a U.S. industry may submit a request to Commerce alleging the existence of serious adverse effects. Although Commerce will be responsible for evaluating the request, the Committee expects, given the focus and nature of the remedy, that Commerce will draw on the expertise of the Commission in analyzing the economic impact of trade flows. The specific procedures for addressing such subsidies are provided at section 281(e)(2) and elaborated in greater detail in the Statement of Administrative Action.

Publication and Consultation About Notified Green Light Subsidy Programs.—Section 281(f) of H.R. 5110 directs USTR promptly to submit to all appropriate congressional committees all reports and other information provided to the WTO Subsidies Committee pursuant to Articles 8.3 and 8.4 of the Agreement regarding notified subsidy programs. Commerce is directed to publish regularly in the *Federal Register* a summary notice of all such reports and information. USTR and Commerce will consult promptly with congressional committees and interested private section representatives regarding such reports and other information.

On February 1 of each year beginning in 1996, Commerce and USTR jointly will issue a report detailing the subsidies practices of major trading partners of the U.S., including prohibited subsidies, subsidies believed to cause serious prejudice, and green light subsidies. The report also will detail all monitoring and enforcement activities of Commerce and USTR relating to subsidies during the preceding year.

Miscellaneous Amendments to Title VII.—Section 281(h) of the bill contains definitions. Section 281(i) authorizes Commerce to share proprietary information with USTR that USTR considers relevant to carry out its responsibilities under this part. USTR must protect such information from public disclosure.

Reasons for change

The changes are necessary to conform U.S. law to the Agreement.

Section 282. Review of subsidies agreement

Present law

There is no comparable provision of current U.S. law.

Explanation of provision

Objectives of the United States.—Section 282 of H.R. 5110 provides for an ongoing review of the Subsidies Agreement and establishes general and specific objectives with respect to that review. The general objectives are to ensure that: (1) the provisions of the Subsidies Agreement regarding red light, dark amber and yellow light subsidies are effective; and (2) the provisions of the Subsidies Agreement regarding green light subsidies do not undermine the benefits derived from the other portions of the Subsidies Agreement.

Specifically, the United States should seek to create a mechanism that will provide for an ongoing review, within the framework of the Subsidies Committee, of the green light subsidies. Footnote 25 of the Subsidies Agreement already contemplates that within 18 months of the date of entry into force of the WTO, the Subsidies

Committee will review the operation of the provisions of the Subsidies Agreement dealing with the green light category of research subsidies. H.R. 5110 requires that the United States seek to expand this commitment to include a review of the operation of all of the provisions of Article 8, as well as of Article 9.

Extension of Articles 6.1(a), 8, and 9.—Section 282(c) provides that the provisions of U.S. law required to implement Articles 8 and 9 (green light subsidies), and Article 6.1(a) (subsidies deemed to cause serious prejudice) expire 66 months after the entry into force of the WTO unless those provisions are extended by Congress. Before the Subsidies Committee makes a decision whether to extend Article 6.1(a) and Articles 8 and 9, USTR is directed to consult with this Committee and the Senate Committee on Finance. Should the Subsidies Committee decide to extend Articles 8, 9 and 6.1(a) of the Agreement, either as currently drafted or in modified form, the Administration, after further consultations with relevant committees and the private sector, will submit legislation to implement the agreed extension. A bill to provide for such an extension would be eligible for consideration under "fast track" procedures. If Articles 8, 9 and 6.1(a) are not extended, section 282(c)(5) of H.R. 5110 directs USTR to submit a report to Congress setting forth the provisions of H.R. 5110 that should be repealed or modified as a result of the sunset of these Articles.

In order to ensure that an informed judgment can be made regarding any extension of Articles 6.1, 8 and 9, section 282(d) of the bill requires Commerce to undertake an ongoing review of the operation of the Subsidies Agreement. In particular, the review would address: (1) the effectiveness of the new remedies provided by the Subsidies Agreement regarding prohibited and actionable subsidies; and (2) the extent to which the provisions of the Subsidies Agreement regarding green light subsidies may have offset the gains conferred by other portions of the Subsidies Agreement. No later than six months prior to the date on which the provisional articles are set to expire under Article 31 of the Subsidies Agreement, Commerce must provide a report to Congress on the results of this review.

Reasons for change

The changes are necessary to conform U.S. law to the Agreement.

Section 283. Amendments to title VII of the Tariff Act of 1930

Present law

There are no comparable provisions of current U.S. law.

Explanation of provision

Section 283(a) of H.R. 5110 amends section 703(b) of the Act to require Commerce to make a preliminary CVD determination within 60 days, rather than the normal 65 days, if the only subsidy under consideration in a CVD investigation is a subsidy or subsidy program with respect to which Commerce, prior to initiation, received notice of a violation of Article 8.

Section 283(b) amends section 775 of the Act in order to clarify that Commerce will treat a notice of violation of Article 8 in the same manner as it treats a countervailable subsidy practice it discovers during a CVD proceeding. Commerce will include the subsidy or subsidy program found to have been in violation of Article 8 in the investigation or review then in progress if it appears that the subsidy is benefitting the merchandise under investigation or review.

Section 283(c) amends section 751 of the Act by adding a new subsection (g). Subsection (g)(1) provides for an expedited review of a CVD order or suspended investigation where Commerce is notified by USTR of a violation of Article 8, but there is no review in progress. The purpose of the expedited review would be to adjust the cash deposit rate or modify the terms of the suspension agreement to account for the subsidy which, as a result of the finding of a violation, has become actionable.

Modification or Revocation of a Duty Order.—Section 751(g) gives Commerce the ability to modify or revoke a CVD order if countermeasures are taken under WTO auspices in order to avoid violating the prohibition in the Subsidies Agreement against dual remedies.

Section 751(g)(3) requires Commerce to conduct an expedited review of a CVD order in these situations to determine whether the rate established for the deposit of estimated countervailing duties should be modified or the order should be revoked. The fact that a foreign government has withdrawn a subsidy does not necessarily mean that the cash deposit rate should be modified, particularly in the case of subsidies whose benefits extend over time. Instead, Commerce would have to analyze the impact of the withdrawal of a subsidy on a case-by-case basis. In addition, the establishment of this type of expedited review is not intended to interfere with Commerce's current practice of accounting for program-wide changes in foreign subsidy programs.

Reasons for change

The change is necessary to conform U.S. law to the Agreement.

SUBTITLE C—EFFECTIVE DATE

Section 291. Effective date

Consistent with the Agreements, section 291 of H.R. 5110 provides that the amendments made by Title II will apply to investigations and reviews based on petitions or requests received after the WTO Agreement enters into force with respect to the United State. Thus, investigations and reviews that are based on petitions or requests received before or on the date the WTO Agreement enters into force with respect to the United States will be completed under the current statutory regime. With regard to self-initiated investigations and reviews, the amendments will apply to investigations and reviews initiated after the entry into force of the WTO Agreement with respect to the United States. For this purpose, the date of publication in the Federal Register of the notice of initiation of the investigation or review will be considered the date of initiation.

TITLE III—ADDITIONAL IMPLEMENTATION OF AGREEMENTS

Title III contains provisions necessary or appropriate to implement the Uruguay Round agreements regarding safeguards, foreign trade barriers and unfair trade practices, unfair practices in import trade, textiles, and government procurement.

SUBTITLE A—SAFEGUARDS

Subtitle A contains various amendments to the U.S. import relief law under sections 201–204 of the Trade Act of 1974 to conform to the Uruguay Round Agreement on Safeguards.

Section 301. Investigations, determinations, and recommendations by International Trade Commission

Present law

Current U.S. law, Title II of the Trade Act of 1974, as amended, is already largely consistent with the Agreement on Safeguards (Agreement). In fact, U.S. law and practice served as a model for the drafters of the Agreement. Accordingly, only minor changes are necessary to bring U.S. law into conformity with the Agreement.

For example, current U.S. law does not authorize the Commission to request that parties submitting confidential information (1) prepare nonconfidential summaries thereof or (2) disclose confidential business information under administrative protective order in safeguards proceedings. Current U.S. law also does not include express provision for notice to parties and opportunity for parties to participate in the proceeding, including by submitting comments and participating in a hearing.

With regard to critical circumstances, the Agreement authorizes swifter relief than is available under current U.S. law. Accordingly section 301 of H.R. 5110 amends the critical circumstances provision of U.S. law, while still permitting domestic industries producing a perishable agricultural product the option of requesting even swifter provisional relief in accordance with the terms of section 202(d)(1).

In addition, consistent with the Agreement, H.R. 5110 codifies existing Commission practice with respect to the definition of the "domestic industry." The Agreement also contains definitions of the terms "serious injury" and "threat of serious injury", which are not defined under current U.S. law. Rather, current law requires the Commission to take into account a list of economic factors in determining whether a domestic industry is seriously injured or is threatened with serious injury.

Explanation of provision

Section 301 of H.R. 5110 implements the provisions of the Agreement that relate to Commission investigations and determinations under section 202 of the Trade Act of 1974 (Trade Act).

Confidentiality.—Section 301(a) amends section 202(a)(8) of the Trade Act to provide that the Commission may request that parties furnish nonconfidential summaries of submissions containing confidential business information. The bill authorizes the Commission to disregard the submission if it finds that a request for confidentiality is not warranted and the party submitting the document is unwilling to make the information public or authorize its disclosure in generalized or summarized form. These changes reflect the confidentiality provision in Article 3.2 of the Agreement.

Administrative protective orders.—Section 301(b) also amends section 202 of the Trade Act to require that the Commission promulgate regulations to provide for disclosure of confidential business information, under an administrative protective order, to authorized representatives of interested parties who are parties to an investigation under section 202.

The Committee expects that these regulations will, in general, parallel the appropriate provisions of section 777 of the Tariff Act of 1930 and the regulations issued under that section. The Committee further expects that the Commission will have in place interim regulations to implement section 301(b) as soon as practicable. Access to such information may prove useful in making presentations and arguments to the Commission relating to industry conditions, injury, and industry plans for positive adjustment to import competition.

Commission procedures.—Section 301(c) amends section 202(b) to codify certain procedural requirements of the Agreement already reflected in current Commission practice, such as the requirement that the Commission publish notice of the institution of its investigation in the Federal Register and provide interested parties at hearings with the opportunity to respond to the presentations of other parties and consumers.

Critical circumstances.—Section 301(d) amends section 202(d)(2) to substitute a new "critical circumstances" provision for the current provision. The new provision should permit an eligible industry to obtain provisional relief in a significantly shorter time than under current law. For example, under the new provision, provisional relief could be provided in 90 days, as compared with 127 days under current law.

Factors relating to threat of serious injury: productivity.—Section 301(e)(1) amends section 202(c)(1)(B)(i) to include "productivity" within the list of economic factors to be considered by the Commission in determining whether a domestic industry is threatened with serious injury. In the past, the Commission has considered data relating to this factor, where appropriate, in determining whether an industry was seriously injured.

Definitions.—Section 301(e)(2) amends section 202(c)(6) to clarify the meaning of the term "domestic industry" and to define the terms "serious injury" and "threat of serious injury." The clarification of the term "domestic industry" codifies existing Commission practice, which is consistent with the meaning given to the term in the Agreement. The definition of serious injury in the Agreement, through use of the modifier "significant," borrows from current U.S. law, which uses the same term in connection with the three economic factors set out in current law for the Commission to consider. Furthermore, the Agreement's definition of "threat of serious injury" follows very closely the definitions for that term set forth in the House and Senate committee reports on the original section 201 under the Trade Act. Thus, incorporation of these definitions into U.S. law should not affect the outcome of Commission decisions.

Textile and apparel products.—Section 301(f) amends section 202(h) by establishing a procedure under which products subject to the WTO Agreement on Textiles and Clothing will become eligible for Commission safeguards investigations as the United States integrates them into GATT 1994 over the ten year transition period provided for in the textiles agreement. Section 301(f) requires the interagency Committee for the Implementation of Textile Agreements, through the Secretary of Commerce, to publish in the Federal Register: (1) the list of those textile and clothing products covered by the Agreement; and (2) notice of when those products will be integrated into GATT 1994 and thus will become eligible for Commission safeguards investigations.

Reasons for change

The changes made by section 301 are necessary or appropriate to conform Title II of the Trade Act of 1974, as amended, to the provisions of the Agreement.

Section 302. Action by President after determination of import injury

Present law

Section 302 of H.R. 5110 implements provisions of the Agreement that relate to the nature and duration of relief (including possible extensions of relief) that the President may provide under section 203 of the Trade Act after he receives an affirmative Commission determination. In particular, under current U.S. law, one of the forms of relief the President may provide is to negotiate, conclude and carry out orderly marketing agreements to limit exports of the product in question. Also, in regard to the duration of relief, under current U.S. law, relief may be provided for up to eight years, but the initial period of relief may be as long as eight years (greater than the four-year limit set by the Agreement).

Explanation of provision

Section 302(a) amends section 203 to replace the term "orderly marketing agreements" currently used in section 203 with the term "agreements described in subsection (a)(3)(E)". The new wording will not make any substantive change in U.S. law, since orderly marketing agreements have been negotiated under section 203 authority only after an affirmative Commission injury determination and have included other GATT contracting parties that have a substantial interest in supplying the product concerned. That practice is consistent with the requirements of the Agreement.

Section 302(b) makes several minor changes to section 203(e) to bring the current limitations on U.S. safeguards actions into conformity with limitations in the Agreement.

Section 302(b)(1) amends section 203(e)(1) to limit the initial period of a relief action to four years and to provide for one or more extensions that may extend the total period of relief to eight years.

Section 302(b)(1) also amends section 203(e)(1) to implement Article 7(2) of the Agreement. That Article requires an affirmative determination in a follow-up investigation before the relief provided in an initial action may be extended.

Section 302(b)(2) amends section 203(e)(4) to provide that import relief in the form of a quota must permit the importation of a quantity or value of the product that is not less than the average quantity or value of imports of that product in the most recent three representative years unless the President finds that setting imports at another quantity or value is clearly justified. Current law does not specify that the representative period must be three years. Neither the Agreement nor the amendment requires that the three years be consecutive.

Section 302(b)(3) amends section 203(e)(5) to require that when import relief is provided for more than one year it must be phased down at "regular intervals" during the relief period. Current law provides that relief in effect for three years is to be phased down "[t]o the extent feasible". The President will retain the discretion to determine the appropriate "regular intervals" and the amount by which the relief is phased down at those intervals.

Section 302(b)(4) adds a new paragraph (7) to section 203(e) limiting the provision of new relief in respect of a product for which import relief was provided previously. These limitations parallel those in current section 202(h), but with the benefit of allowing an industry to file a new petition with the Commission up to eight months earlier than under current law, since the limitation is expressed in terms of when new relief may be provided instead of when a new petition may be filed. A special exception will allow new import relief to be provided in the following year where relief was provided for 180 days or less. The bill also makes a conforming change for this purpose to section 202(h), which governs Commission investigations.

Section 302(c) makes minor adjustments in section 204(a)(2) of the Trade Act, which governs the time for submission of Commission monitoring reports during the relief period. The principal effect of the changes is to require the Commission to submit a monitoring report to the President and the Congress up to six months earlier than under current law in some instances.

Section 302(d) further amends section 204 by adding a new subsection (c) to implement Article 7(2) of the Agreement, which governs determinations regarding the extension of relief. The bill provides for Commission investigations at the request of the President or on receipt of a petition from the concerned industry, when relief has been granted, as to whether relief continues to be needed to prevent or remedy serious injury and whether the industry is adjusting to import competition.

Reasons for change

The changes made by section 302 are necessary or appropriate to conform current U.S. law to the specific requirements of the Agreement.

Section 303. Miscellaneous amendments

Present law

Sections 202 and 203 of the Trade Act provide respectively for investigations, determinations and recommendations by the Commission, and action by the President after a Commission determination.

Explanation of provision

Section 303 of H.R. 5110 makes certain technical corrections in sections 202 and 203.

Reasons for change

The changes made by section 303 involve mostly correction of cross-referencing errors identified by the Commission in its December 1993 report to the House Committee on Ways and Means, *Proposed Reorganization of U.S. International Trade Relief Laws* (USITC Investigation No. 332–341).

Section 304. Effective date

Subtitle A and the amendments made by this subtitle take effect on the date the WTO Agreement enters into force for the United States, except that the amendment made by section 301(b) takes effect on the date of enactment of this Act.

SUBTITLE B—FOREIGN TRADE BARRIERS AND UNFAIR TRADE PRACTICES

Subtitle B contains necessary or appropriate changes to sections 181, 182, and 301–310 of the Trade Act of 1974 to conform to the Uruguay Round Dispute Settlement Understanding, to clarify authorities under these domestic laws related to that Understanding, as well as to set forth U.S. objectives on intellectual property related to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Section 311. Identification of foreign anticompetitive practices

Section 312. Consultation with committees

Present law

Section 181 of the Trade Act of 1974 requires an annual report (by March 31) by the USTR to the appropriate committees of the House and the Senate Finance Committee which identifies, analyzes, and estimates the impact on U.S. exports of significant foreign barriers to, or distortions of, U.S. exports of goods or services and U.S. foreign direct investment. This National Trade Estimates (NTE) report also includes information on any action taken, or reasons for no action taken, to eliminate any measure identified.

Explanation of provision

Section 311 of H.R. 5110 amends section 181 of the Trade Act of 1974 to require the USTR to include a separate section on foreign anticompetitive practices, the toleration of which by foreign governments is adversely affecting U.S. exports of goods or services. This section of the NTE report shall be prepared by USTR in consultation with the Attorney General.

Section 312 amends section 181(b)(3) of the 1974 Act to require the USTR, following submission of the annual NTE report, to consult periodically with, and take into account the views of, the appropriate committees of the House and the Senate Finance Committee regarding means to address the foreign trade barriers identified in the report, including the possible initiation of section 301 investigations or other trade actions.

Reasons for change

The requirement to include a separate section on foreign anti-competitive practices in the NTE report will ensure that such practices are identified and analyzed. The Committee remains concerned about the adverse impact of anti-competitive, market-restrictive behaviors on the part of foreign enterprises which is tolerated by foreign governments. The Committee is particularly concerned that such problems may exist in the auto parts, glass, and financial services sectors and expects that, where appropriate, the tools which will be strengthened by this amendment and the amendments to section 301 identified below will be used to address these practices.

Sections 181 of the 1974 Act presently requires the USTR to keep the appropriate committees of the House and the Senate Finance Committee currently informed through the NTE report with respect to trade policy priorities for the purpose of expanding market opportunities. The requirement for period consultations with Congressional committees following each annual report is intended to ensure that foreign trade barriers are addressed after they are identified, including through the use of self-initiated section 301 cases were appropriate, and to provide for effective policy coordination.

Section 313. Identification of countries that deny protection of intellectual property rights

Section 182 of the Trade Act of 1974 ("Special 301") requires the USTR to identify, within 30 days after submission of the annual NTE report to the Congress, (1) those foreign countries which deny adequate and effective protection of intellectual property rights or fair and equitable market access to U.S. persons that rely upon intellectual property protection; and (2) those countries under (1) determined by USTR to be "priority foreign countries". USTR must initiate a section 301 investigation on practices identified as a priority foreign country unless USTR determines and reports to the Congress that initiation would be detrimental to U.S. economic interests.

Explanation of provision

Section 313 of H.R. 5110 amends section 182 of the 1984 Act in three respects: (1) adding the history of intellectual property laws and practices of the foreign country, including any previous identification, and the history of U.S. efforts and the response of the foreign country to achieve adequate and effective intellectual property rights protection and enforcement as elements which must be taken into account by USTR in identifying foreign countries; (2) clarifying that a foreign country may be identified notwithstanding that it may be in compliance with the specific obligations of the TRIPs Agreement, and adding forms of intellectual property to the existing coverage subject to section 182; and (3) requiring the USTR to submit an annual report to the House Ways and Means and Senate Finance Committees on actions taken under "Special 301" during the preceding 12 months and the reasons for such actions, including a description progress made in achieving improved protection and market access for intellectual property rights.

Reasons for change

These amendments, in conjunction with amendments to section 301 authorities described under section 314 below, modify U.S. trade laws so that they can be used to pursue more effectively intellectual property protection in the international marketplace in the years ahead. Although substantial progress has been made in recent years in improving intellectual property protection abroad, much remains to be done. The amendments are intended to strengthen the hand of U.S. negotiators in future bilateral and multilateral negotiations with out trading partners, and to supplement U.S. efforts to end piracy against, and ensure markets abroad for, U.S. intellectual property-based industries.

Section 314. Amendments to title III of the Trade Act of 1974

Present law

Title III, Chapter 1 of the Trade Act of 1974 (sections 301–309) provides the authority under U.S. domestic law to enforce U.S. rights against violations of trade agreements by foreign countries of foreign unjustifiable, unreasonable, or discriminatory acts, policies, or practices that burden or restrict U.S. commerce. Investigations may be initiated under section 302 by petition or self-initiated by USTR.

Section 303 requires the use of dispute settlement procedures under the GATT or other trade agreements to proceed in parallel with the domestic investigation on any case that involves a trade agreement with the aim of seeking a mutually satisfactory resolution of the issues. Upon initiation of an investigation, USTR must request consultations with the foreign country concerned, and request dispute settlement proceedings (if applicable) if the issues are not resolved within the earlier of the end of the consultation period under the agreement or 150 days.

In cases involving trade agreements, USTR must make unfairness and action determinations under section 304 within 30 days of conclusion of the dispute settlement process, if applicable, or 18 months from initiation, whichever is earlier. In cases not involving trade agreements or involving the 1979 GATT Agreement on Subsidies and Countervailing Measures, the determinations are due within 12 months of initiation. In "Special 301" intellectual property investigations of "priority foreign countries", the determinations are due within six months of initiation, which may be extended to nine months in specified circumstances. USTR must report to Congress on any cases which are not resolved within the minimum dispute settlement period under the applicable trade agreement.

Section 301 authorizes USTR to take all appropriate and feasible action, subject to the specific direction of the President, to obtain the elimination of a trade agreement violation or other actionable act, policy, or practice. Retaliatory action must be taken within 30 days of such a determination, unless delayed for up to six months based upon reasons specified in the statute. The USTR may withdraw or suspend trade agreement concessions and impose restrictions on imports of goods or restrictions on services of the foreign country of equivalent effect, as well as take all other appropriate and feasible action within the power of the President that the President may direct the USTR to take. USTR must give preference to action in the form of tariffs rather than other import restrictions.

Section 306 requires the USTR to monitor compliance with measures or agreements undertaken by foreign governments to settle section 301 cases, and to determine what further action to take under section 301 if implementation is not satisfactory. Section 309 requires a semiannual report from the USTR to the Congress describing the status and actions regarding all section 301 petitions and investigations.

Section 301 of the 1974 Act ("Super 301") requires the USTR within 30 days after the NTE report is submitted to the Congress in 1989 and 1990, to identify U.S. trade liberalization priorities. This identification includes priority practices as well as priority foreign countries and estimates of the amount by which U.S. exports would have increased during the preceding year if the practices identified did not exist. The USTR is required to initiate section 301 investigations on all priority practices identified for each of the priority countries within 21 days after submitting a report to the House Ways and Means and Senate Finance Committees.

Explanation of provision

Section 314 of the H.R. 5110 amends various provisions of section 301 of the Trade Act of 1974 with respect (1) to the scope of authority of the Trade Representative to respond to trade agreement relations and other unfair trade practices by foreign governments; (2) the definition of "unreasonable" intellectual property and anticompetitive practices covered by the authority; (3) time limits for determinations; (4) monitoring of foreign government compliance with trade agreements; and (5) extension of "Super 301" authority.

1. Scope of section 301 authority.—Subsection (a) amends section 301(a)(1) and (b)(2) to clarify that the USTR may take actions, subject to the direction of the President, which encompass any power of the President with respect to trade in goods or services or any other area of pertinent relations with the foreign country in question. Subsection (a) also amends section 301(c)(5) to eliminate the requirement to give priority to imposition of duties in all instances as the form of action. Such preference for the imposition of duties is to be accorded only if the USTR determines that action under section 301 is to be in the form of import restrictions.

Subsection (b) amends section 301(c) to grant the USTR authority to withdraw, limit, or suspend benefits granted under the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), or the Andean Trade Preference Act if the foreign government act, policy, or practice also fails to meet the eligibility criteria for receiving duty-free treatment under these programs.

Under existing law, the Trade Representative can take such action only at the direction of the President.

2. Unreasonable practices related to intellectual property or anticompetitive activities.—Section 314(c) amends the definition of an "unreasonable" act, policy or practice under section 301(d) with respect to intellectual property and anticompetitive practices.

With respect to intellectual property, the subsection clarifies that USTR may determine that a country is denying adequate and effective protection of intellectual property rights notwithstanding that the country may be in compliance with the TRIPs Agreement. The amendments add to the definition the denial of nondiscriminatory market access opportunities for U.S. persons that rely on intellectual property protection. Under existing law, denial of such market access opportunities is expressly covered only under section 182 of the 1974 Act ("Special 301").

The amendments also amplify the definition under section 301 of "adequate and effective protection of intellectual property" to encompass a broader range of intellectual property rights. The "denial of fair and equitable nondiscriminatory market access opportunities" is also defined to include denial through restrictions related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property rights in protected works or fixations or products embodying protected works.

With respect to foreign anticompetitive practices, subsection (c) clarifies that the definition of "unreasonable" act, policy or practice regarding foreign government toleration of systematic anticompetitive activities applies to: (1) state-owned enterprises as well as private firms; (2) denial of fair and equitable market access opportunities for U.S. services as well as goods; and (3) anticompetitive practices that restrict the sale of U.S. goods or services to a foreign market, not just to foreign firms that engage in such practices.

3. Times for determinations.—Section 314(d) amends section 304 to apply the 18-month deadline under present law for determinations in section 301 investigations to all investigations involving trade agreements, including on subsidies and countervailing measures. Subsection (d) also extends the reporting requirement on dispute settlement to cases involving subsidies and countervailing measures.

In addition, subsection (d) amends section 304 to apply the standard 18-month time limit for making determinations in section 301 investigations to matters involving the TRIPs Agreement where the investigation is initiated as the result of a "priority foreign country" identification under "Special 301." The existing six- and nine-month time limits will continue to apply to investigations involving intellectual property initiated as a result of a "priority foreign country" identification where the TRIPs Agreement or another trade agreement is not involved.

4. Monitoring of agreements to resolve section 301 investigations.—Section 314(e) amends section 306 to require the USTR to monitor the implementation of each measure or agreement undertaken by a foreign government to resolve a matter subject to a section 301 investigation, whether or not the USTR has made a determination under section 304 that the foreign government's act, policy, or practice is unreasonable. Under existing law, section 306 applies only when USTR has made such a determination.

Subsection (e) also amends section 306 to require the USTR, if the USTR considers that a foreign country has failed to implement a WTO panel recommendation satisfactorily in a case involving the United States, to determine within 30 days after the expiration of the "reasonable period of time" for implementation of panel recommendations provided for in Article 21 of the DSU what action to take under section 301(a).

5. *Identification of trade expansion priorities.*—Section 314(f) amends section 310 of the 1974 Act to require the USTR to review U.S. trade expansion priorities and identify and report to the House Ways and Means and Senate Finance Committees within 180 days of the submission of the NTE report for calendar year 1995 (i.e., by September 30, 1995) on the priority foreign country practices that are likely to have the most significant potential to increase U.S. exports. The USTR may also cite in the report practices that may warrant identification in the future or that were not identified because they are already being addressed by U.S. trade law, existing bilateral trade agreements, or progress is being made in negotiations toward their elimination.

Within 21 days after the report is submitted, the USTR must initiate section 301 investigations of any priority practices identified in the report. The USTR shll seek elimination of the practices as quickly as possible or, if elimination is not feasible, compensatory trade benefits. The semiannual report required by section 309 will include the status of such negotiations.

Reasons for change

The Committee wishes to ensure that section 301 authority remains a strong and effective means for the United States to enforce its rights under trade agreements and to deal with other foreign unfair trade practices. The basic purpose of the amendment under section 314 is to strengthen section 301 as a basic trade policy tool, including by clarifying that the broad scope of authority under section 301 permits the use of non-trade retaliatory measures as well as the imposition of trade restrictions if disputes cannot be satisfactorily resolved.

The amendments also ensure that section 301 can be used to address the full range of foreign intellectual property and anticompetitive practices that may be burdening or restricting U.S. commerce. The amendments permit USTR to scrutinize foreign government restrictions on commercial activities related to products protected by intellectual property rights to determine if the restrictions discriminate or are otherwise unfair or inequitable.

The amendments to the timeframes for USTR determinations under section 301 are necessary to conform to the timeframe for completing dispute settlement proceedings under the DSU so that the results of those proceedings are available before any trade sanctions are imposed. For the most part, time periods established under U.S. law for dispute settlement proceedings are already consistent with relevant DSU provisions.

The amendments to section 306 strengthen USTR's ability to monitor and enforce compliance with agreements and other measures by foreign governments undertaken to resolve section 301 investigations. They also provide for the USTR to take action within a 30-day timeframe in the event that a foreign country fails to implement a WTO panel or Appellate Body recommendation in the reasonable period of time provided.

Section 314(f) codifies for one year the Executive Order issued by President Clinton on March 3, 1994, that requires the review and identification of U.S. trade expansion priorities for 1994 and 1995. Section 310 as amended provides a more flexible and useful market-opening tool then the original "Super 301" authority by focusing on identification of priority practices rather than the naming of foreign countries, by authorizing early warning to foreign countries of practices that may be identified in the future, and recognizing means other than section 301 that may address the problem.

Section 315. Objectives in intellectual property

Present law

No provision.

Explanation of provision

Section 315 of H.R. 5110 states it is the objective of the United States:

(1) to accelerate the implementation of the TRIPs Agreement;

(2) to seek enactment and effective implementation by foreign countries of laws to protect and enforce intellectual property rights that supplement and strengthen the standards of the TRIPs Agreement and the NAFTA, in particular to cover new and emerging technologies and new methods of transmission and distribution, and to prevent or eliminate discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;

(3) to secure fair, equitable, and nondiscriminatory market access opportunities for U.S. intellectual property-based industries;

(4) to take an active role in the development of the intellectual property regime under the WTO to ensure it is consistent with other U.S. objectives; and

(5) to take an active role in the World Intellectual Property Organization to develop a cooperative and mutually supportive relationship with the WTO.

Reasons for change

Although the United States has made great strides in recent years in improving the level of protection for, and enforcement of, U.S. intellectual property rights abroad, both through the successful negotiation of the TRIPs Agreement and through various bilateral agreements and understandings, more remains to be done to ensure a level of protection and enforcement worldwide comparable to that provided in the United States. For that reason, the Committee believes that the President and the Executive Branch should continue to place intellectual property high on the nation's international trade agenda in the years ahead.

In order to provide direction on where the President and the Executive Branch should focus their efforts in the field of intellectual property, section 315 sets forth objectives in intellectual property. The Committee strongly endorses these objectives. In particular, the Committee believes that every reasonable effort should be made to accelerate the implementation of the TRIPs agreement, to supplement and strengthen the provisions of this agreement and the NAFTA, particularly with respect to new and emerging technologies, and to prevent or eliminate discrimination with respect to the full exercise of intellectual property rights. Moreover, the Committee believes that the United States should take an active role in the WIPO to develop a worldwide intellectual property regime consistent with U.S. objectives and cooperative and mutually supportive relationship between WIPO and the WPO, particularly with respect to the implementation of the new TRIPs agreement.

Reasons for change

Although the United States has made great strides in recent years in improving the level of protection for, and enforcement of, U.S. intellectual property rights abroad, both through the successful negotiation of the TRIP Agreement and through various bilateral agreements and understandings, more remains to be done to ensure a level of protection and enforcement worldwide comparable to that provided in the United States. For that reason, the Committee believes that the President and the Executive Branch should continue to place intellectual property high on the nation's international trade agenda in the years ahead.

In order to provide direction on where the President and the Executive Branch should focus their efforts in the field of intellectual property, section 315 sets forth objectives in intellectual property. The Committee strongly endorses these objectives. In particular, the Committee believes that every reasonable effort should be made to accelerate the implementation of the TRIPs agreement, and to supplement and strengthen the provisions of this agreement and the NAFTA, particularly with respect to new and emerging technologies and to prevent or eliminate discrimination with respect to the full exercise of intellectual property rights. Moreover, the Committee believes that the United States should take an active role in the WIPO to develop a worldwide intellectual property regime consistent with U.S. objectives and cooperative and mutually supportive relationship between WIPO and WPO, particularly with respect to the implementation of the new TRIPs agreement.

Section 316. Effective date

Subtitle B and the amendments made by this subtitle take effect on the date the WTO Agreement enters into force for the United States, except that the amendment made by section 314(f) takes effect on date of enactment.

SUBTITLE C—UNFAIR PRACTICES IN IMPORT TRADE

Section 321. Unfair practice in import trade

Present law

Section 337 of the Tariff Act of 1930 authorizes the U.S. International Trade Commission (Commission) to exclude goods from the United States and enjoin activities with respect to imports that are found to infringe U.S. intellectual property rights or are otherwise found to violate that statute.

In November 1989, the General Agreement on Tariffs and Trade (GATT) adopted a dispute settlement panel report that found that Commission procedures in investigations to determine whether there is a violation of section 337 are inconsistent with the national treatment rule because they treat imported goods less favorably than the procedures that district courts apply to domestic goods in infringement proceedings. In particular, the panel found that:

section 337 imposes time limits for reaching a final determination whereas there is no time limits in district court proceedings;

importers and producers of imported products may have to defend claims in both the Commission and in district court, possibly at the same time, whereas infringement claims against domestic goods can be heard only in district court;

section 337 grants overly broad authority to the Commission to issue "general exclusion" orders barring the importation of infringing products;' and

section 337 procedures, unlike those of the federal courts, do not permit counterclaims.

Explanation of provision

Section 321(a) of H.R. 5110 amends section 337 of the Tariff Act of 1930. Section 321(b) amends certain provisions of Title 28 of the U.S. Code concerning district court proceedings involving the same claims as those raised in section 337 Commission proceedings or claims removed to the district court from the Commission.

Time limits.—Section 321(a)(1) amends section 337(b) to eliminate the requirement that the Commission issue a final determination within a fixed period of time. Instead, the amendment provides that the Commission must complete its investigation "at the earliest practicable time." To promote rapid adjudication, the Commission must establish a "target date" for completion of an investigation within 45 days after its is initiated.

These requirements parallel the procedures set out in recently revised Rule 16 of the Federal Rules of Civil Procedure providing district courts with various mechanisms for expediting litigation. They are also consistent with district court efforts to avoid delay, such as by establishing target dates for the completion of various stages of litigation.

Counterclaims.—Section 321 (a)(2) and (b)(3) amend section 337(c) to address the issue of counterclaims. Subsection (a)(2) permits a respondent in a Commission proceeding under section 337 to raise any counterclaim. The right to raise counterclaims provided by the amendment supplements language currently included in section 337(c) that permits a respondent to raise all legal and equitable defenses and does not affect a party's right to raise such defenses.

Under this amendment, after raising a counterclaim the respondent must file a notice of removal of the counterclaim with a district court or proper venue. The amendment also grants the district court original jurisdiction over compulsory counterclaims. However, Commission respondents will have to establish jurisdiction with respect to permissive counterclaims independently. Further, any dismissal, termination, or withdrawal of the complainant's action in the Commission will not affect a counterclaim that has been removed to a district court pursuant to section 337(c).

Section 321(b)(3) instructs district courts to handle the counterclaims removed to them pursuant to section 337(c) just as if they had been filed as an original complaint under the Federal Rules of Civil Procedure, expect that a filing fee will not be required. Sections 321 (a)(2) and (b)(2) provide that counterclaims raised before the Commission and removed to the district court will relate back to the date of the original complaint filed by the complaining party at the Commission. These provisions will be particularly relevant with respect to the tolling of applicable statutes of limitations and the calculation of damages in infringement actions.

The Commission's proceedings will not be delayed or affected if a counterclaim is raised and removed to district court. Additionally, the Commission will review, as it has in the past, the effect of exclusions or orders under sections 337 (d), (e), (f), and (g) in determining whether relief will be granted.

Exclusion orders.—Section 321(a)(5) treats the circumstances in which general exclusion orders are warranted and reflects suggestions by the GATT panel on this subject. The underlying concepts do not differ significantly from the criteria for general exclusion orders that the Commission has developed through administrative practice in recent years.

Access to confidential information.—Section 321(a)(7) amends section 337 to clarify and amplify the list of persons who may have access to confidential information in the context of Commission investigations and the review and enforcement of Commission orders. The amendments should facilitate administration of the statute and Commission orders.

Parallel proceedings.—Section 321(b)(1) adds a new section in Title 28 to address the possibility that infringement proceedings may be brought against imported goods in two forums at the same time. The new section requires a district court hearing an infringement case to stay its proceedings, at the request of a respondent in a section 337 proceeding, with respect to any claim that involves the same issues as those pending before the Commission. Such issues would include questions of patent validity, infringement, and any defenses that might be raised in both proceedings. The district court may use its discretionary authority to stay any other claims in the action before it. To avoid abuse of this provision and to encourage prompt adjudication in the district courts, any request for a stay must be made within 30 days after the defendant in a district court action is effectively served or 30 days after a party is formally named as a respondent in a Commission action, whichever is later.

When a district court dissolves its stay after the completion of Commission proceedings, subsection (b)(1) permits the Commission record to be offered as evidence in the court's proceedings. Although use of particular portions of the record would have to pass scrutiny under the Federal Rules of Evidence and Federal Rules of Civil Procedure, use of the Commission record could expedite proceedings and provide useful information to the court.

Other amendments.—Other amendments in section 321 relate to bonding requirements and the deference accorded to arbitration agreements and are designed to bring section 337 and Commission practice into closer conformity with district court rules and practice with respect to these matters. The amendments require the Commission to establish bonding amounts and other relevant requirements and give the Commission the discretion to order forfeiture of the bond under terms and conditions that the Commission may prescribe. Currently, bonds are forfeited to the U.S. Treasury. In establishing the terms and conditions of the bond and whether to order forfeiture of the bond, the Commission is to be guided by practice under Rule 65 of the Federal Rules of Civil Procedure with respect to the forfeiture of a complainant's bond. In addition, the amendments make decisions relating to bonds subject to judicial review.

Reasons for change

The amendments are necessary to ensure that U.S. procedures for dealing with alleged infringements by imported products comport with GATT 1994 "national treatment" rules, while providing for the effective enforcement of intellectual property rights at the border. A number of provisions of section 337 were found by a GATT panel in 1988 to violate U.S. national treatment obligations under the GATT.

In addition, certain amendments included in section 321 are designed to bring Commission practice with respect to bonding requirements and the deference given arbitration agreements into closer conformity with district court practice, recognizing that the Agreement on Trade-Related Aspects of Intellectual Property Rights, negotiated after the panel report was issued, acknowledges that it may be necessary to treat domestic and imported products differently in order to enforce intellectual property rights with respect to imported goods.

Section 322. Effective date

The amendments set out in section 321 will apply only to those complaints filed under section 337 after the WTO Agreement goes into effect with respect to the United States.

SUBTITLE D—TEXTILES

Subtitle D contains four sets of amendments necessary or appropriate to implement the Uruguay Round Agreement on Textiles and Clothing in an effective manner.

Section 331. Textile product integration

Present law

No provision.

Explanation of provision

Section 331 of H.R. 5110 provides that, no later than 120 days after the WTO Agreement enters into force for the United States, the Secretary of Commerce will publish a notice in the Federal Register listing the products to be integrated into the GATT 1994 at the beginning of the fourth, eighth, and eleventh year after the Agreement on Textiles and Clothing takes effect. Section 331 further provides that the list once published cannot be changed unless required by law, U.S. international obligations, to correct technical errors, or to reflect reclassifications. USTR shall notify the list to the Textiles Monitoring Body (TMB) under the Agreement no later than 30 days after its publication.

Reasons for change

The Uruguay Round Agreement on Textiles and Clothing: (1) replaces the Multifiber Arrangement (MFA), which governs international trade in textiles and apparel through the use of quantitative restrictions, and (2) provides for the gradual and complete integration of these products into the GATT regime over a 10-year transition period. Article 2 of the Agreement calls for the liberalization and elimination of quotas on textile and apparel imports from WTO members in three successive tranches—on the date the Agreement takes effect, three years later, and at the beginning of year eight. Each country must declare those products covered by the Agreement it will "integrate," that is, those textiles and apparel products for which it will henceforth observe full GATT disciplines.

Section 331 of the implementing bill establishes the timetable and requirements for publication of the list of products which the United States will integrate in conformity with Article 2 of the Agreement. The SAA details the procedures that will be used by the Committee for the Implementation of Textile Agreements (CITA) in the selection process. The Committee intends that these requirements provide certainty and transparency for the industry, importers, and retailers as to the timetable for integration of specific products in order to facilitate a smooth transition.

Section 332. Amendment to section 204 of the Agricultural Act of 1956

Present law

Section 204 of the Agricultural Act of 1956, as amended, authorizes the President to negotiate agreements with foreign countries to limit their exports of agricultural or textiles and textile products to the United States, and to issue regulations governing the entry of products subject to those agreements. If a multilateral agreement on textile or agricultural products is concluded among countries accounting for a significant part of world trade in the products concerned, the President may issue regulations governing the entry of the same products from countries which are not parties to the multilateral agreement.

Explanation of provision

Section 332 of H.R. 5110 amends section 204 of the Agricultural Act of 1956 (1) to clarify that the Uruguay Round Agreement on Textiles and Clothing constitutes a multilateral agreement for purposes of section 204 and; (2) to extend the President's authority to regulate imports from countries that are parties to such an agreement but to which the United States does not apply that agreement.

Reasons for change

The amendments made by section 332 clarify that the President's authority under section 204 to regulate textile imports under multilateral agreements includes the Uruguay Round agreement and that the United States may regulate imports of textiles and textile products from countries, such as China, which are either not members of the WTO or to whom the United States does not yet apply the WTO.

Section 333. Textile transshipments

Present law

Section 484(a) of the Tariff Act of 1930, as amended by section 637 of the Customs Modernization Act (Title VI of Public Law 103–182), requires that an importer of record use "reasonable care" in making entry of merchandise. This includes responsibility for filing with the Customs Service such documentation or information as is necessary for Customs to determine whether the statutory requirements are met for release of the merchandise from Customs' custody.

Explanation of provision

Section 333 of H.R. 5110 adds a new section 592A to the Tariff Act of 1930 to establish procedures to make information available to assist importers in avoiding importation of textile and apparel products that have been illegally transshipped.

Subsection (a) authorizes the Secretary of the Treasury to publish in the Federal Register semiannually a list naming any foreign manufacturers, suppliers, sellers, or exporters against whom the Customs Service has issued a penalty claim under section 592 and a final decision under section 618, if a petition has been filed under that section, for involvement in violations of the customs laws. The violations are: using or providing information which indicates a false or fraudulent country of origin or source of textile or apparel products; using or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation for entry; manufacturing, producing, supplying, or selling textile or apparel products labelled with a false or fraudulent country of origin or source; or engaging in practices that aid or abet the transshipment of textile or apparel products in a manner that conceals the true country of origin or permits the evasion of quotas or voluntary restraint agreements.

Subsection (b) authorizes the President, following consultations with the Secretaries of Treasury and Commerce and the heads of other appropriate departments and agencies, such as the Department of State, to publish in the Federal Register annually a list of countries in which illegal activities have occurred involving transshipped textile or apparel products or activities designed to evade U.S. quotas on those products if those countries fail to demonstrate a good faith effort to cooperate with the United States in ceasing such activities.

Both subsections (a) and (b) provide for removal of the foreign person or country from the list. The Secretary of the Treasury will require any importer of record entering, introducing, or attempting to introduce textile or apparel products from any person or country on the lists to show to the satisfaction of the Secretary that it has exercised "reasonable care" to ascertain or ensure provision of accurate country of origin information.

Reasons for change

Article 5 of the Uruguay Agreement on Textiles and Clothing calls upon member countries to "establish the necessary legal provisions and/or administrative procedures to address and take action against" circumvention by transshipment, re-rerouting, false declaration of origin, and false documentation of textile and clothing imports. The lists will provide information needed by importers to know who is engaging in illegal transshipments so that circumvention of quota restrictions can be reduced.

Section 334. Rules of origin for textile and apparel products

Present law

Existing Customs Service practice for determining the origin of textile and apparel products is based on a "substantial transformation" test set out in the final rule published in the Federal Register on March 5, 1985 (T.D. 85–38) and regulations published in 19 CFR 12.130.

Explanation of provision

Section 334 of H.R. 5110 requires the Secretary of the Treasury to promulgate regulations in final form by July 1, 1995, for determining the origin of textiles and apparel products for purposes of the customs laws and administering quantitative restrictions, based on the principles set forth in subsection (b). These principles will have the greatest significance for the rules of origin applicable to textile and apparel products other than fibers, yarns, or fabrics. For these other products, mostly apparel products, the principles contain a three-tier test for determining country of origin:

First, if the product is wholly assembled in a single country, that country is the country of origin. Second, if the product is assembled in more than one country, the product will be deemed to originate in the country in which the "most important" assembly or manufacturing process occurred. Third, if origin cannot be determined according to either of the preceding principles, the product will be considered to originate in the country in which the "last important assembly or manufacturing" occurred.

The three-tier test, i.e., the "assembly" rule, will not apply to:

Products whose components are cut in the United States and assembled abroad into an article that is then returned to the United States;

Products covered by the U.S.-Israel Free Trade Area Agreement;

Products that are knit to shape; and

Made-up articles and other specified products for which an assembly rule is not appropriate.

The new rule will not affect existing duty-free treatment under the Caribbean Basin Initiative program for articles (except textile or apparel articles) assembled in the Caribbean wholly of U.S. components, and imported directly into the United States, nor the application of such components toward the 35 percent minimum value-added rule of origin requirement under the existing program.

Subsection (c) provides that the regulations implementing section 334 will apply to products entered or withdrawn from warehouse for consumption on or after July 1, 1996. The rules will not apply, however, to products entered or withdrawn from warehouse on or before January 1, 1998 that are subject to a binding sales contract entered into before July 20, 1994, if the contract specified all the material terms of sale and a copy of the contract is filed with the Commissioner of Customs within 60 days after date of enactment with a certification that the contract meets the requirements. The Customs Service will determine the origin of products to which the regulations issued under section 334 do not apply according to the rules in effect as of July 20, 1994.

Reasons for change

The new regulations required by section 334, to be based largely on a country-of-assembly rule of origin, will reflect the important rule of assembly in the manufacture of apparel, reduce circumvention of quota limits through outward processing, and help to reduce transshipments by providing greater certainty and uniformity in the application of origin rules.

As indicated in the SAA, proposed rules are expected to be published within 90 days after date of enactment to provide an opportunity for the private sector to comment fully on the application of the principles and the interpretation of various terms.

The "grandfather" exception under subsection (c) and the 18 month delay on implementation of the new regulations are intended to ensure that the new rules do not upset legitimate commercial expectations under preexisting contracts and have as little disruptive impact on the trade as possible.

Section 335. Effective date

Except as provided in section 334, subtitle D and the amendments made by this subtitle take effect on the date the WTO Agreement enters into force for the United States.

SUBTITLE E—GOVERNMENT PROCUREMENT

Title III of the Trade Agreements Act of 1979 implements the obligations of the Tokyo Round Agreement on Government Procurement in U.S. law. Title III authorizes the President to waive Buy

American and similar restrictions on Federal Government purchases of eligible products by covered entities from Agreement signatory countries and to impose sanctions in the form of procurement restrictions on foreign countries which maintain significant and persistent discrimination against U.S. goods or services in their procurement.

Title III would continue as the implementing legislation for the new Uruguay Round Agreement on Government Procurement, with amendments to conform Title III to the new Agreement, and other appropriate changes. As described in the Statement of Administrative Action, Federal-State consultation requirements under section 102 of the bill would apply to procurement obligations undertaken by certain States under the Agreement.

Section 341. Monitoring and enforcement of the Agreement on Government Procurement

Present law

Section 305 of the Trade Agreements Act of 1979, as amended by Title VII of the Omnibus Trade and Competitiveness Act of 1988, requires the President to identify annually any foreign country that maintains a significant and persistent pattern or practice of discrimination in their government procurement against U.S. goods or services which results in identifiable harm to U.S. businesses. The USTR must request dispute settlement proceedings within 60 days with any identified country which is a signatory to the Agreement on Government Procurement. U.S. procurement restrictions must be imposed on the signatory country if, within one year after initiation of dispute settlement, the proceedings are not concluded, or the country has not complied with the Agreement or taken recommended action satisfactory to the President.

Explanation of provision

Section 341 of H.R. 5110 amends certain time limits and criteria for imposing sanctions under section 305 of the Trade Agreements Act of 1979. Subsection (a) and (b) amend section 305(f) to apply a 18-month, rather than one year, time limit after the initiation of dispute settlement proceedings for the President to impose sanctions on signatory countries identified as not in compliance with the Agreement. The amendments also add as a third basis for imposing sanctions on an identified signatory country, namely that the dispute settlement procedures result in a determination providing a specific period of time for the country to bring its practices into compliance, that period has expired and procedures for affected countries to suspend concessions under the Agreement have been completed.

Subsection (c) amends section 305(d) of the 1979 Act to require the President to identify, in the annual Title VII report to the Congress on foreign discrimination in government procurement, countries which are not signatories to the Agreement that fail (1) to apply transparent and competitive procedures to their government procurement equivalent to those in the Agreement, or (2) maintain and enforce effective prohibitions against bribery and other corrupt practices in connection with government procurement. In both cases, a country must be identified only if its products or services are acquired in significant amounts by the U.S. Government.

Reasons for change

The amendments to the time limits for determinations and the additional basis for imposing sanctions on identified signatory countries are necessary to conform with the time limits adopted under the WTO Dispute Settlement Understanding for completing dispute settlement proceedings and the bases for countries to impose sanctions consistent with that Understanding.

Section 342. Conforming amendments

Present law

Section 308(4) of the Trade Agreements Act of 1979 defines "eligible product" on which the President may waive Buy American and similar restrictions to include products or services of Israel valued above a $50,000 contract threshold which would be covered by the GATT Agreement on Government Procurement as of the date of entry into force of the U.S.-Israel FTA.

Explanation of provision

Section 342 of H.R. 5110 contains various technical amendments to conform or update Title III of the Trade Agreements Act of 1979 to apply to the new Uruguay Round Agreement on Government Procurement. In addition, subsection (f) amends the definition of "eligible product" under section 308(4) of the 1979 Act to maintain application of the lower $50,000 threshold under the U.S.-Israel FTA on goods, or to apply the lower threshold to the broader central government entity coverage of goods and services under the new Uruguay Round Agreement if a subsequent agreement between the United States and Israel lowers the threshold for those entities on a reciprocal basis.

Reasons for change

The amendment to section 308(4) is necessary to maintain the status quo application of the lower threshold under the U.S.-Israel FTA to goods in view of the expanded coverage of new Uruguay Round Agreement, unless and until a bilateral agreement is reached to further liberalize procurement by applying the lower threshold to the broader goods and services coverage under the Agreement on a reciprocal basis. The definitional change is necessary to ensure that, until a subsequent agreement is reached, the lower threshold established by the FTA only applies to the procurement of goods and not to the procurement of services or construction materials and services, which are covered by the new Agreement but not by the FTA.

Section 343. Reciprocal competitive procurement practices

Present law

Section 302 of the Trade Agreements Act of 1979 requires the President, with respect to procurement covered by the Agreement on Government Procurement, to prohibit procurement of products from foreign countries which are not designated eligible for the waiver of Buy American and similar restrictions on government procurement of such products (i.e., from countries, other than least developed countries, which are not parties to the Agreement or otherwise assume Agreement obligations). The prohibition may be waived in specified circumstances.

But American Act restrictions do not apply if goods are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Explanation of provision

Section 343 of H.R. 5110 amends section 302 of the Trade Agreements Act of 1979 to lift the ban on procurement from non-signatory countries to the Agreement in certain circumstances. Subsection (a) amends section 302(a) of the 1979 Act to make clear that the prohibition on purchasing from countries which are not signatories to the Agreement does not apply in the case of procurements for which there are no offers of goods or services of the United States or of signatory countries or when such offers are insufficient to fulfill U.S. Government requirements.

Subsection (b) amends section 302(b) of the 1979 Act to authorize the President to waive the prohibition against procurement of products from any country that has not yet become a party to the Agreement if that country (1) has agreed to apply transparent and competitive government procurement procedures equivalent to those in the Agreement, and (2) maintains and enforces effective prohibitions on bribery and other corrupt practices in connection with its government procurement. The President must consult with appropriate private sector advisory committees and with the appropriate Congressional committees before exercising this waiver authority. Subsection (c) makes technical conforming changes in section 305(g).

Reasons for change

The purpose of the ban on U.S. Government procurement from non-signatory countries to the Agreement included in the 1979 Act was to encourage additional countries to accede to the GATT Agreement and thereby provide reciprocal opportunities for U.S. goods and services in foreign procurement markets. The Administration and the Committee believe that providing authority to waive this ban for countries which apply transparent and competitive procedures in their procurement markets and maintain noncorrupt procurement regimes will provide a more effective policy tool and leverage to open procurement opportunities for U.S. business. Even if the purchasing prohibition is waived, Buy American preferences for U.S. bidders will continue to apply as long as the country concerned is not a signatory to the new Uruguay Round Agreement. The amendment to not apply to ban in cases of nonavailability of adequate supplies is similar to the exemption from restrictions under the Buy American Act.

Section 344. Effective date

The amendments made by Subtitle E take effect on the date on which the Uruguay Round Agreement on Government Procurement enters into force for the United States, except that the amendments made by section 342(g) (to section 401 of the Rural Electrification Act of 1938) take effect on the date the WTO Agreement enters into force for the United States.

TITLE IV—AGRICULTURE-RELATED PROVISIONS

SUBTITLE A—AGRICULTURE

PART I—MARKET ACCESS

Section 401. Section 22 amendments

Present law

Section 22 of the Agricultural Adjustment Act of 1933 authorizes the President to impose import quotas or fees that he determines are necessary to ensure that imports of a product do not undermine a domestic, agricultural-commodity price-support program or other agricultural program.

Under section 22, the Secretary of Agriculture advises the President when the Secretary has reason to believe that—

(1) imports of an article are rendering, or tending to render ineffective, or materially interfering with, any domestic, agricultural-commodity price-support program or other agricultural program; or

(2) imports of an article are reducing substantially the amount of any product processed in the United States from any agricultural commodity or product covered by such programs.

If the President agrees that there is reason for the Secretary's belief, the President must order an ITC investigation and report. Using this report as his basis, the President must determine whether the statutory conditions warranting imposition of a section 22 quota or fee exist.

If the President makes an affirmative determination, he is required to impose, by proclamation, either import fees (which may not exceed 50 percent ad valorem) or import quotas (which may not exceed 50 percent of the quantity imported during a representative period) sufficient to prevent imports of the product concerned from harming or interfering with the relevant agricultural program.

Section 22 authority supersedes any inconsistent provisions in international agreements entered into by the United States. (To remedy the inconsistency between section 22 and GATT Articles II and XI, the United States received a waiver of its GATT obligations for section 22 in 1955.)

Section 301(c) of the U.S.-Canada FTA Implementation Act amended section 22 to authorize the President to exempt specified Canadian grain and sugar-containing products from any import restrictions imposed under section 22.

Section 321(b) of the NAFTA Implementation Act amended section 22 to authorize the President to exempt any "qualifying good" from Mexico (defined as any agricultural good that meets, based on its U.S. and Mexican content alone, the rules of origin established under section 202 of the NAFTA Implementation Act) from any quota or fee imposed under section 22, for so long as Mexico is a NAFTA country.

Section 202 of the Agricultural Act of 1956 establishes particular parameters for one of the section 22 quotas on cotton.

Section 103B of the Agricultural Act of 1949 establishes special import quotas for cotton, thereby allowing cotton imports in addition to those permitted under section 22 cotton import quotas.

Explanation of provision

Section 401(a)(1) of H.R. 5110 amends section 22 of the Agricultural Adjustment Act of 1933, such that no quota or fee shall be imposed under this section with respect to any import that is the product of a country or separate customs territory to which the United States applies the WTO Agreements. Accordingly, when only products of WTO members are involved, there would be no need to conduct a section 22 investigation. Section 22 authority is retained with respect to imports from countries and separate customs territories to which the United States does not apply the WTO agreement.

Section 401(a)(2) establishes the effective date of the amendment made by paragraph (1) as the date of entry into force of the WTO Agreement with respect to the United States, except as that amendment applies to wheat. With respect to wheat, section 402(a)(2) establishes the effective date of the amendment made by paragraph (1) as the later of the date of entry into force of the WTO Agreement with respect to the United States or September 12, 1995.

Section 401(b) makes conforming amendments to trade laws to reflect the conversion of current section 22 import restrictions to tariff-rate quotas pursuant to Schedule XX. In addition, section 401(b) amends the special import quotas for cotton, provided for in section 103B of the Agricultural Act of 1949, to covert these quotas from quantitative quotas to tariff-rate quotas. Section 401(b) also makes technical amendments to simplify the names of the tariff-rate quotas, so that the tariff-rate quota under section 103B(a)(5)(F) will be referred to henceforth as the "special import quota" and the tariff-rate quota under section 103B(n) will be referred to as the "limited import quota."

Reasons for change

Under the Uruguay Round agreements, the United States committed to comprehensive tariffication, i.e., conversion of all non-tariff barriers on agricultural imports, such as quotas and fees authorized under section 22 of the Agricultural Adjustment Act of 1933, to tariff equivalents, such as tariff-rate quotas. Changes made to present law under section 401 reflect this conversion.

The effective date of the amendment made by paragraph (1) is established as the entry into force of the WTO Agreement with respect to the United States since this is the date on which it is expected that the tariff-rate quotas provided for in Schedule XX will be proclaimed. The effective date of the amendment made by paragraph (1) with respect to wheat is established as the later of the date of entry into force of the WTO Agreement with respect to the United States or September 12, 1995 in recognition of the Memorandum of Understanding between the United States and Canada, which will be effective from September 12, 1994 through September 11, 1995, and under which the United States will establish tariff-rate quotas on wheat imports.

Section 402. Cheese and chocolate crumb imports

Present law

Section 701 and 703 of the Trade Agreements Act of 1979 impose certain non-tariff restrictions on the importation of cheese and chocolate crumb. Section 702 of the 1979 Act requires the President to impose quantitative import restrictions on cheese when price-undercutting conditions exist.

Explanation of provision

Section 402(a) of H.R. 5110 repeals sections 701 and 703 of the Trade Agreements Act of 1979.

Section 402(b) strikes the provision in section 702 of the 1979 Act that requires the imposition of quantitative limitations on cheese imports if there is price undercutting by such products but leaves in place a remedy for price undercutting by subsidized cheese imports in the form of a countervailing duty.

Section 402(c) makes various technical and conforming amendments to section 702 of the 1979 Act.

Reasons for change

Changes made to present law by section 402 reflect the conversion, under comprehensive tariffication, from quantitative quotas on cheese and chocolate-crumb imports to tariff-rate quotas. Imposing a quantitative restriction on such imports would be inconsistent with the obligations of Article 4.2 of the Agreement on Agriculture; however, additional U.S. Note 13 to Chapter 4 of Schedule XX specifically states in connection with tariff-rate quotas for cheese that the United States retains the right to impose fees on within-quota quantities when the price-undercutting conditions of section 702 exist.

Section 403. Meat Import Act

Present law

The Meat Import Act of 1979 requires the President to impose quotas on imports of beef, veal, mutton, and goat meat when the aggregate quantity of such imports on an annual basis is expected to exceed a prescribed trigger level. The trigger level is 110 percent of the base-quantity level, which is established by statute and adjusted annually to reflect domestic-supply levels. The quotas are allocated among supplying countries on the basis of their historic shares of the U.S. market.

The President may suspend or raise Meat-Import-Act quotas on the basis of—

(1) overriding economic or national-security interests;

(2) inadequate domestic supplies at reasonable prices; or

(3) the implementation of trade agreements. (In recent years, the United States has negotiated Voluntary Restraint Arrange-

ments with one or more supplier countries if necessary to avoid triggering quotas.)

Section 301(b) of the U.S.-Canada FTA Implementation Act amended the Meat Import Act to exempt Canadian meat articles from quotas imposed under this statute.

Section 301(b) of the U.S.-Canada FTA Implementation Act also amended the Meat Import Act to authorize the President to impose import restrictions on Canadian meat articles if he—

(1) has proclaimed limitations on meat articles under the Meat Import Act, or entered into one or more agreements regarding meat articles, other than with Canada, pursuant to section 204 of the Agricultural Act of 1956; and

(2) determines that the Government of Canada has not taken equivalent action.

Section 321(a) of the NAFTA Implementation Act amended the Meat Import Act to exempt Mexican meat articles from quotas imposed under this statute.

Explanation of provision

Section 403 of H.R. 5110 repeals the Meat Import Act of 1979.

Reasons for change

The change made to present law by section 403 reflects the conversion, under comprehensive tariffication, from quantitative quotas on meat imports to tariff-rate quotas.

Section 404. Administration of tariff-rate quotas

Present law

Section 321(c) of the NAFTA Implementation Act directs the President to take such action as may be necessary to ensure that imports of goods subject to tariff-rate quotas do not disrupt the orderly marketing of commodities in the United States.

Section 2(g) of the Meat Import Act authorizes the President to suspend or raise import quotas imposed under this statute on the basis of—

(1) overriding economic or national-security interests;

(2) inadequate domestic supplies at reasonable prices; or

(3) the implementation of trade agreements.

U.S. Note 2 to Chapter 99, Subchapter IV of the HTS provides for certain exclusions from section 22 quotas.

Section 22 of the Agricultural Adjustment Act of 1933 and the Meat Import Act of 1979 authorize the President to allocate, among supplying countries, quotas established under these Acts.

Additional U.S. Note 3 to Chapter 17 of the HTS provides for the administration of the tariff-rate quota for sugar. Note 3 was proclaimed under the authority for the existing sugar tariff-rate quota.

The Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act authorize the President to proclaim duty-free treatment for all eligible articles from beneficiary countries with certain statutory exemptions.

Title V of the Trade Act of 1974, which provides the statutory basis for the GSP program, authorizes the President to provide duty-free treatment on any eligible article from any designated, beneficiary developing country, with certain statutory exemptions (including for reasons of import sensitivity), and with certain statutory limitations based on competitive need.

Under the CBI, the Andean Initiative, and the GSP program, duty-free treatment applies only to sugars, syrups, and molasses imported into the United States from beneficiary countries within the in-quota quantities established under the tariff-rate quotas that are set out in U.S. Notes 2, 3, and 4 to Chapter 17 of the HTS.

General Note 3(a)(iv) to the HTS specifies the tariff treatment of goods imported from insular possessions of the United States.

Section 313 of the Tariff Act of 1930 provides for drawback, that is, a refund or remission, in whole or in part, of a customs duty, internal-revenue tax, or fee, which is lawfully assessed or collected on imported merchandise. Such a refund or remission is provided because of a particular use made of the imported merchandise and the exporation, or destruction under Customs-Service supervision, of—

(1) the imported merchandise on which the duty, tax, or fee was assessed or collected, or substitute merchandise; or

(2) articles manufactured or produced from the imported merchandise or substitute merchandise.

Section 313(j)(1) provides for drawback on imported merchandise that is—

(1) exported, or destroyed under Customs-Service supervision, within three years of importation; and

(2) not used within the United States before such exportation or destruction.

Section 313(j)(2) provides for drawback on domestic or imported merchandise substituted, on the basis of commercial interchangeability, for the imported merchandise that is—

(1) exported, or destroyed under Customs-Service supervision, within three years of importation of the imported merchandise;

(2) not used within the United States before such exportation or destruction; and

(3) in the possession of the drawback-claiming party who must have either imported the imported merchandise or received that merchandise, or a commercially interchangeable substitute, from the party who imported, and paid any duty due on, the imported merchandise.

Section 358 of the Agricultural Adjustment Act of 1938 relates to the domestic peanut program and specifically, provides greater flexibility to domestic handlers of additional peanuts when the President raises the section 22 import quota on peanuts.

Explanation of Provision

Section 404(a) of H.R. 5110 authorizes the President to take such action as may be necessary, in implementing the tariff-rate quotas set out in the U.S. agricultural tariff concessions in Schedule XX, to ensure that imports of agricultural products do not disrupt the orderly marketing of commodities in the United States.

Section 404(b) authorizes the President to temporarily increase the in-quota quantity of an agricultural import that is subject to a tariff-rate quota when he determines and proclaims that the supply of the same, directly competitive, or substitutable agricultural product will be inadequate, because of natural disaster, disease, or major national-market disruption, to meet domestic demand at reasonable prices.

Section 404(c) requires the Secretary of Agriculture to monitor the domestic supply of agricultural products subject to a tariff-rate quota as the Secretary considers appropriate. This section also requires the Secretary to advise the President when the domestic supply of such agricultural products and substitutable products, combined with the estimated imports of the products under the tariff-rate quota, may be inadequate to meet domestic demand at reasonable prices.

Section 404(d)(1) authorizes the President to provide for certain exclusions from the general rule that an imported agricultural product is subject to the over-quota rate of duty established under a tariff-rate quota when the imported quantity of such product exeeds the in-quota quantity. Under this provision, the President may provide that an imported agricultural product shall *not* be subject to the over-quota rate of duty established under a tariff-rate quota if such product is—

(1) imported by, or for the account of, any U.S. agency or any foreign embassy;

(2) imported as a sample for taking orders, for the personal use of the importer, or for the testing of equipment;

(3) a commercial sample, or entered for exhibition, display, or sampling at a trade fair or for research; or

(4) a certain type of blended syrup and entered under certain conditions from a foreign trade zone.

Section 404(d)(2) authorizes the President, subject to the consultation and layover requirements of section 115 of H.R. 5110, to proclaim a modification to the coverage of a tariff-rate quota for any agricultural product if he determines such modification is necessary or appropriate, as a result of a Customs-Service reclassification, to conform the tariff-rate quota concerned to Schedule XX.

Section 404(d)(3) authorizes the President to allocate, among supplying countries or customs areas, the in-quota quantity of a tariff-rate quota for any agricultural produce, and to modify any allocation as he determines appropriate.

Section 404(d)(4) authorizes the President to proclaim an increase in the in-quota quantity established under the Schedule XX tariff-rate quota for beef if he determines that such an increase is necessary to implement side agreements reached with Argentina on March 24, 1994, and with Uruguay and march 9, 1994. Under these side agreements, the United States has agreed to increase the in-quota quantity of the tariff-rate quota for beef to provide each of those countries with 20,000 tons of access in the event that the United States determines that fresh, chilled, and frozen beef from those countries meets U.S. health and safety standards.

Section 404(d)(5) authorizes the President to reproclaim additional U.S. Note 3 to Chapter 17 of the HTS, with appropriate modifications to reflect the U.S. agricultural tariff concessions in Schedule XX. These modifications include deleting Note 3's reference to establishing the quota period, and changing the provisions in Note 3 on duty drawback, since section 404(e)(5)(A) of H.R.

5110 limits the availability of drawback of over-quota tariff amounts for a tariff-rate quota on an agricultural product.

Section 404(e)(1) amends section 213 of the Caribbean Basin Economic Recovery Act to prohibit, under the CBI, duty-free treatment for an eligible agricultural import when such a product is subject to a tariff-rate quota and the imported quantity exceeds the in-quota quantity.

Section 404(e)(2) amends section 204 of the Andean Trade Preference Act to prohibit, under the Andean Initiative, duty-free treatment for an eligible agricultural import when such a product is subject to a tariff-rate quota and the imported quantity exceeds the in-quota quantity.

Section 404(e)(3) amends section 503 of the Trade Act of 1974 to prohibit, under the GSP program, duty-free treatment for an eligible agricultural import when such a product is subject to a tariff-rate quota and the imported quantity exceeds the in-quota quantity.

Section 404(e)(4) amends General Note 3(a)(iv) to the HTS to prohibit duty-free treatment for an agricultural import from an insular possession of the United States when such a product is subject to a tariff-rate quota and the imported quantity exceeds the in-quota quantity.

Section 404(e)(5)(A) amends section 313 of the Tariff Act of 1930 to provide that no drawback shall be available on an agricultural product subject to the over-quota rate of duty established under a tariff-rate quota, except under section 313(j)(1), that is, when such product is—

(1) exported, or destroyed under Customs-Service supervision, within three years of importation; and

(2) not used within the United before such exportation or destruction.

Section 404(e)(5)(B) establishes as the effective date of the amendment made by paragraph (A) the earlier of the date of entry into force of the WTO Agreement with respect to the United States or January 1, 1995.

Section 404(e)(6) amends section 358 of the Agricultural Adjustment Act of 1938 to provide greater flexibility to domestic handlers of additional peanuts when the President, because of inadequate supply to meet domestic demand at reasonable prices, increases the in-quota quantity of imported peanuts under the relevant tariff-rate quota, as set out in Schedule XX.

Reasons for change

Section 404 includes changes and additions to present law that provide specific authority for administering the tariff-rate quotas being established for agricultural products under comprehensive tariffication and pursuant to Schedule XX.

For purposes of determining the availability or lack thereof of duty drawback on durum wheat imported under the tariff-rate quota established pursuant to the Memorandum of Understanding between the United States and Canada (effective September 12, 1994), the Committee expects the over-quota quantity for the tariff-rate quota on durum-wheat imports to be defined in the Presidential proclamation establishing such tariff-rate quota as above 450,000 metric tons.

Section 405. Special agricultural safeguard authority

Present law

Sections 201–204 of the Trade Act of 1974, the generic safequard provisions in U.S. trade law, authorize the President to provide import relief after receiving a report from the ITC that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive article. The ITC investigation is carried out with respect to imports from all sources.

The ITC must (1) make an injury determination within 120 days (150 days in extraordinarily complicated cases) of the filing of a petition; and (2) submit a remedy recommendation and report to the President within 180 days of the filing of a petition. Any Presidential action must be taken within 60 days of receiving an affirmative determination.

The President may provide provisional import relief for perishable agricultural products within 28 days after the filing of a petition if the ITC (1) has monitored imports for at least 90 days; and (2) has made an affirmative preliminary injury determination. A perishable agricultural product is defined as any agricultural article (including livestock) regarding which the USTR considers action appropriate after taking into account (1) whether the article has a short shelf life, a short growing season, or a short marketing period; (2) whether the article is treated as a perishable product under any other Federal law or regulation; and (3) any other factor the USTR considers appropriate.

On products other than perishable agricultural products, the President may provide provisional import relief generally within 127 days after the filing of a petition if the ITC has (1) made an affirmative injury determination; (2) determined that critical circumstances exist. Critical circumstances exist if the petitioner alleges and the ITC determines that a substantial increase in imports (either actual or relative to domestic production) over a relatively short period of time has led to circumstances in which a delay in taking action would cause harm that would significantly impair the effectiveness of such action.

Import relief may take the form of a tariff, tariff-rate quota, quantitative restriction, orderly marketing agreement, adjustment, or other measure, or any combination thereof. Any tariff increase may not exceed a level that is 50 percent above the existing rate. Any quantitative restriction must permit the importation of a volume or value of the article not less than the level imported during the most recent representative period.

Import relief, aside from orderly marketing agreements, is generally provided under present law on a global MFN basis, although the President may take action without regard to nondiscriminatory application after considering the international obligations of the United States.

Import relief actions may not exceed eight years. A subsequent investigation of an article that has been the subject of import relief cannot be initiated for a period of time equivalent to the period of relief.

Section 302(b) of the U.S.-Canada FTA Implementation Act established the criteria and procedures for implementing the obligations under Article 1102 of the U.S.-Canada FTA with respect to the application of global import relief measures to imports from Canada.

Section 107 of the NAFTA Implementation Act suspended section 302(b) on the date the United States and Canada agreed to suspend the operation of the U.S.-Canada FTA by reason of the entry into force between them of the NAFTA.

Section 107 of the NAFTA Implementation Act suspended section 302(b) on the date the United States and Canada agreed to suspend the operation of the U.S.-Canada FTA by reason of the entry into force between them of the NAFTA.

Sections 311 and 312 of the NAFTA Implementation Act incorporate standards and procedures for applying global relief actions to imports of articles originating in Canada or Mexico. Such standards and procedures are similar to those in section 302(b) of the U.S.-Canada FTA Implementation Act, reflect the fact that the NAFTA is trilateral rather than bilateral in nature and provide greater flexibility in the criteria for determining the significance of NAFTA imports.

Section 315 of the NAFTA Implementation Act amends section 202(d) of the Trade Act of 1974 to add "citrus product" to the coverage of provisional relief authority. "Citrus product" is defined as any processed oranges or grapefruit, or any orange or grapefruit juice, including concentrate.

Section 301(a) of the U.S.-Canada FTA Implementation Act incorporates into U.S. law the provisions of Article 702 of the U.S.-Canada FTA by establishing the right, under certain conditions, for the United States, during the twenty-year period after the date on which this agreement entered into force, to impose a temporary duty on imports of certain Canadian fresh fruits and vegetables.

Section 301(a) authorizes the Secretary of Agriculture to recommend to the President the imposition of a temporary duty on imports of a Canadian fresh fruit or vegetable if the Secretary determines that (1) for each of five consecutive working days, the import price of such Canadian fresh fruit or vegetable is below 90 percent of the corresponding five-year average monthly import price; and (2) the planted acreage in the United States for the like fresh fruit or vegetable is no higher than the average planted acreage over the preceding five years, excluding the years with the highest and lowest acreage. Whenever the Secretary makes a determination that these two conditions exist, he must promptly submit for publication in the Federal register a notice of such determination. In determining whether to recommend to the President the imposition of a temporary duty, the Secretary must consider whether these two conditions have led to a distortion in U.S.-Canada trade in such fruit or vegetable, and if so, whether the imposition of the duty is appropriate for reasons including whether it would significantly correct this distortion.

Within seven days of receiving the Secretary's recommendation, and after taking into account the national economic interests of the United States, the President must determine whether to impose a temporary duty, and if so, he must proclaim the temporary duty on the Canadian fresh fruit or vegetable concerned.

Any temporary duty, together with any other duty in effect, may not exceed the lesser of (1) the column-one (MFN) rate of duty in effect prior to January 1, 1989, for the applicable season; or (2) the column-one rate of duty in effect at the time the temporary duty is applied.

No temporary duty may be imposed on shipments that were in transit on the first day that the duty was in effect.

Any temporary duty ceases to apply to articles entered on or after the earlier of (1) the day following five consecutive working days during which the Secretary determines that the Canadian point-of-shipment price exceeds 90 percent of the corresponding five-year average monthly import price; or (2) 180 days after the temporary duty first took effect.

No temporary duty may be applied while import relief under the generic safeguard provisions in Title II of the Trade Act of 1974 is in effect with respect to the fruit or vegetable concerned.

The Secretary may issue regulations to implement these provisions. The Commissioner of Customs and the Director of the Bureau of the Census must cooperate in providing the Secretary with timely information and import data to administer this provision.

The authority to impose temporary duties under this section expires twenty years after the date on which the U.S.-Canada FTA entered into force.

Section 308 of the NAFTA Implementation Act amends section 301(a) of the U.S.-Canada FTA Implementation Act to provide that the President may impose a temporary duty on imports of a Canadian fresh fruit or vegetable if—

(1) the Secretary of Agriculture determines that both of the conditions in the statute (relating to (1) the import price of the fresh fruit or vegetable; and (2) the planted U.S. acreage for the like product exist, and submits immediately for publication in the Federal Register a notice of such determination;

(2) the Secretary, not later than six days after such publication, decides to recommend to the President the imposition of a temporary duty, and forwards this recommendation to the President immediately; and

(3) not later than seven days after receiving this recommendation, the President makes a determination to impose the temporary duty.

Section 308 also requires the Commissioner of Customs and the Director of the Census Bureau to provide the Secretary with timely information concerning the importation of Canadian fresh fruits and vegetables, and requires importers to report such information that the Commissioner of Customs requires.

Section 309 of the NAFTA Implementation Act establishes a price-based duty "snapback" for frozen concentrated orange juice imported from Mexico into the United States. Specifically, if the futures price for frozen concentrated orange juice in the United States falls below an historical average price for five consecutive days, the duty on frozen concentrated orange juice imported from Mexico into the United States in excess of a certain "threshold quantity" will "snap back" or revert, to the lesser of (1) the prevailing MFN rate of duty; or (2) the rate of duty in effect as of July 1, 1991.

The temporary "snapback" duty ceases to apply if the futures price of frozen concentrated orange juice in the United States rises above the historical average price for five consecutive days. The tariff snapback is automatically triggered and removed on the determination by the Secretary of Agriculture that the relevant price conditions exist. The Secretary's determinations must be published in the Federal Register.

Section 202 of the NAFTA Implementation Act sets forth the rules of origin established under Chapter 4 of the NAFTA to ensure that NAFTA preferential tariff treatment is granted only to products produced or manufactured in the United States, Mexico, and Canada.

Explanation of provision

Section 405 of H.R. 5110 establishes, pursuant to Article 5 of the Uruguay Round Agreement on Agriculture, a special safeguard (SSG) for designated, tariffied agricultural products in the form of duty increases on imports of such products. Tariffied agricultural products that the U.S. Government designated in Schedule XX as being subject to the Article 5 SSG are hereinafter referred to as "SSG agricultural goods."

Article 5 provides for the use of the SSG when either (1) annual imports of an SSG agricultural good exceed a trigger level that is based on existing market-access opportunity (defined as imports as a percentage of the corresponding domestic consumption during the three years which precede the year during which the safeguard action is taken and for which data is available) ("volume-based SSG"); or (2) imports of an SSG agricultural good enter at a price that falls below a trigger that is set at an average, 1986–1988 reference price ("price-based SSG").

For purposes of determining the volume of imports required for invoking the volume-based SSG, imports entering under the current- and minimum-access levels established in the Uruguay Round Agreement on Agriculture are counted; however, additional duties imposed by invoking either the volume-based or the price-based SSG are not imposed on such imports.

Any supplies of the product concerned that were en route on the basis of a contract settled before an additional duty was imposed by invoking the volume-based SSG are exempted from this additional duty. Such "grandfathered" imports may be counted, however, in the volume of imports of the product concerned during the following year for purposes of triggering the volume-based SSG during that year.

Any additional duty imposed by invoking the volume-based SSG can only be maintained until the end of the year in which the duty has been imposed. The level of such additional duty may not exceed 33.3 percent of the ordinary customs duty in effect in the year in which the SSG action is taken.

Any additional duty imposed by invoking the price-based SSG is imposed on a shipment-by-shipment basis. the level of such additional duty varies with the difference between the import and trigger prices and the percentage of the trigger price this difference represents.

For perishable and seasonal products, shorter time periods and different reference prices for different periods are permitted.

Section 405(a) of H.R. 5110 requires the President consistent with Article 5 as determined by the President, to—

(1) determine the trigger levels for the volume-based and the price-based SSGs, as well as the periods that are relevant for purposes of applying the SSGs; and

(2) publish in the Federal Register, by no later than the date of entry into force of the WTO Agreement with respect to the United States, the list of products designated in Schedule XX as SSG agricultural goods, and for each such good, the trigger levels for the volume-based and the price-based SSGs, as well as the periods that are relevant for purposes of applying the SSGs.

The President is also required to determine and publish in the Federal Register the trigger levels for the volume-based SSG on an annual basis after the initial year in which the SSG went into effect.

Section 405(b) authorizes the President to invoke either the volume-based or the price-based SSG, if he determines that such action is appropriate with respect to an SSG agricultural good. Section 405(b) also requires the President, if he determines that it is appropriate to invoke either the volume-based or the price-based SSG, to determine, consistent with Article 5 as determined by the President, the amount of the additional duty to be imposed, the period during which such duty will be imposed, and any other terms and conditions applicable to the duty.

Section 405(c) requires the President to direct the Secretary of the Treasury to impose the additional duty on the SSG good in accordance with a determination made under subsection (b).

Section 405(d) prohibits the imposition of an additional duty on an SSG agricultural good during any period in which such good is the subject of any import relief action taken under section 202 or 203 of the Trade Act of 1974.

Section 405(e) authorizes the President to exempt from any duty imposed by invoking the SSG, any good originating in a NAFTA country, as determined in accordance with section 202 of the NAFTA Implementation Act.

Section 405(f) requires that the Secretary of Agriculture advise the President on the implementation of section 405.

Section 405(g) establishes the termination date of section 405 as the date, as determined by the President, that the SSG provisions of Article 5 are no longer in force with respect to the United States. (It is expected that Article 5 will remain in force for the United States for the duration of the Uruguay Round Agreement on Agriculture's six-year implementation period, which begins in 1995, and could be extended upon the agreement of member countries).

Section 405(h) defines terms used in section 405.

Reasons for change

Section 405 implements the SSG provisions in Article 5 of the Uruguay Round Agreement on Agriculture.

PART III—OTHER PROVISIONS

Section 421. Authority for certain actions under article XXVIII

Present law

Article XXVIII of the GATT 1947 or the GATT 1994 provides for the modification or withdrawal of previously negotiated concessions, with possible compensation to Contracting Parties that constitute principle or substantial suppliers of the product concerned and/or hold initial negotiating rights with respect to such product.

Section 125 of the Trade Act of 1974 provides authority for the termination of, or the U.S. Government's withdrawal from, any trade agreement entered into by the United States under this Act. Specifically, section 125 authorizes the President to terminate any proclamations made under the 1974 Act.

Whenever the United States, acting in pursuit of its rights or obligations under any trade agreement entered into under the 1974 Act, section 201 of the Trade Expansion Act of 1962, or section 350 of the Tariff Act of 1930, withdraws, suspends or modifies any of its obligations to a foreign country, the President is authorized, under section 125, to proclaim increased tariffs or other import restrictions as he deems necessary or appropriate in order to exercise the rights, or fulfill the obligations, of the United States. Such proclamation authority is limited to tariff increases of up to (1) 50 percent above the column-two rate in effect on January 1, 1975; or (2) 20 percent ad valorem above the rate existing on January 1, 1975, whichever is higher.

Explanation of provision

Section 421(a) of H.R. 5110 amends section 125 of the Trade Act of 1974 to authorize the President to proclaim tariff increases on certain types of imported tobacco and tobacco products up to 350 percent ad valorem above the rates existing on January 1, 1975, for those imports. The tobacco and tobacco-product imports for which tariff-increase authority is provided under this section are those on which the United States has notified the GATT of its intent to take action under Article XXVIII.

Section 421(b) establishes the effective date of this provision as the date of enactment of H.R. 5110.

Reasons for change

Section 421 provides the President with expanded authority to increase tariffs on certain tobacco and tobacco-product imports in order to convert existing tariffs on such imports to tariff-rate quotas pursuant to Article XXVIII of the GATT 1974 or the GATT 1994.

Section 422. Tobacco imports

Present law

Section 1106(a) of the Omnibus Budget Reconciliation Act (OBRA) of 1993 provides that U.S. manufacturers of cigarettes, who do not use, in 1994, and in each year thereafter, at least 75 percent U.S.-produced tobacco in the manufacture of cigarettes both for domestic consumption and for export, must—

(1) pay a domestic-marketing assessment, which is equal to the difference between (1) the average of domestic burley and flue-cured tobacco market prices for a certain period; and (2) the average market prices for imported tobacco for a corresponding period;

(2) make additional purchases, up to the amount of the shortfall, from area marketing associations for burley and flue-cured tobacco; and

(3) pay penalties if they (the U.S. manufacturers) fail to pay the required domestic-marketing assessments or make the necessary additional purchases from area marketing associations.

Section 1106(b)(1) requires importers of all unmanufactured tobacco to pay, as of January 1, 1994, budget-deficit assessments that are analogous, but not equivalent in every instance, to budget-deficit assessments required, under section 1105 of the Omnibus Budget Reconciliation Act (OBRA) of 1990, of domestic producers and purchasers of U.S.-produced tobacco.

Section 1106(b)(2), requires, effective January 1, 1994, no-net-cost assessments on imported flue-cured and burley tobacco in amounts that are identical to the amounts of such assessments on like domestic tobacco. This requirement represented an attempt to equalize, with respect to the two major types of tobacco, the conditions for U.S.-produced tobacco, which was subject to no-net-cost assessments, and imported tobacco, which was not, prior to the enactment of the OBRA of 1993.

Section 1106(c) supplements existing requirements that tobacco inspection costs cover the costs of services provided, by requiring that inspection fees for imported tobacco "be comparable to the fees and charges fixed and collected for services provided in connection with tobacco produced in the United States."

Section 313 of the Tariff Act of 1930 provides for drawback, that is, a refund or remission, in whole or in part, or a customs duty, internal-revenue tax, or fee, which is lawfully assessed or collected on imported merchandise. Such a refund or remission is provided because of a particular use made of the imported merchandise, and the exportation, or destruction under Customs-Service supervision, of—

(1) the imported merchandise on which the duty, tax, or fee was assessed or collected, or substitute merchandise; or

(2) articles manufactured or produced from the imported merchandise or substitute merchandise.

Section 313(j)(1) provides for drawback on imported merchandise that is—

(1) exported, or destroyed under Customs-Service supervision, within three years of importation; and

(2) not used within the United States before such exportation or destruction.

Section 313(a) of the Tariff Act of 1930 provides for drawback on imported merchandise used in the manufacture or production in the United States of articles that are exported, or destroyed under Customs-Service supervision, and not used prior to such exportation or destruction.

Drawback is not permitted under this subsection on imported wheat used in the production of flour, or other by-products, which are exported, or destroyed under Customs-Service supervision.

When two or more products result from the manipulation of imported merchandise, the drawback is distributed among the several products in accordance with their relative values at the time of separation.

Explanation of provision

Section 422(a) of H.R. 5110 amends section 320C of the Agricultural Adjustment Act of 1938, as amended by section 1106 of the OBRA of 1993, to provide authority to the President to eliminate domestic-marketing assessments on U.S. cigarette manufacturers who fail, in 1994, and in each year thereafter, to meet a 75-percent domestic content requirement. In short, section 422(a) would make section 1106(a) of the OBRA of 1993 inapplicable with respect to cigarette production after 1994.

Section 422(b) addresses section 1106 of the OBRA of 1993 by amending section 106(g) of the Agricultural Act of 1949 to make budget-deficit assessments on imported flue-cured and burley tobacco identical to such assessments on like domestic tobacco and to make budget-deficit assessments non-applicable to imported oriental tobacco. Oriental tobacco is not produced in the United States.

Section 422(c) authorizes the President to waive the application to imported tobacco of budget-deficit assessments, no-net-cost assessments, and the OBRA of 1993 provision on inspection fees, if the President determines such waivers to be necessary or appropriate pursuant to an international agreement entered into by the United States.

Section 422(d) amends section 313 of the Tariff Act of 1930 to provide that no drawback shall be available on any tobacco subject to the over-quota rate of duty established under a tariff quota, except under——

(1) section 313(j)(1), which provides for "same-condition, unused" drawback on imported merchandise that is exported, or destroyed under Customs-Service supervision, within three years of importation, and not used within the United States before such exportation or destruction; and

(2) section 313(a), which provides for "direct-identification, manufacturing" drawback on imported merchandise that is used in the manufacture or production in the United States of articles that are exported, or destroyed under Customs-Service supervision, and not used prior to such exportation or destruction.

Section 422(e) establishes the effective date of this section as the effective date of the Presidential proclamation, authorized under section 421 of H.R. 5110, establishing a tariff-rate quota pursuant to Article XXVIII of the GATT 1947 or the GATT 1994 with respect to tobacco.

Reasons for change

This section makes changes to present law to bring the United States into conformity with a GATT dispute-settlement-panel decision rendered in July 1994.

Section 423. Tobacco proclamation authority

Present law

See description of present law under *Section 111. Tariff modifications.*

Explanation of provision

Section 423(a) of H.R. 5110 authorizes the President, after consultation with the House Committee on Ways and Means and with the Senate Committee on Finance, to proclaim the reduction or elimination of any duty set forth in Schedule XX with respect to cigar binder and filler, wrapper, or oriental tobacco.

Section 423(b) establishes the effective date of this provision as the date of enactment of H.R. 5110.

Reasons for change

Section 423 authorizes tariff reduction or elimination on cigar binder and filler, wrapper, or oriental tobacco in order to implement cuts that were not reflected in Schedule XX but that are supported by domestic users of such tobaccos.

Section 424. Report to Congress on access to Canadian dairy and poultry markets

Present law

No provision.

Explanation of provision

Section 424 of H.R. 5110 requires the President, not later than six months after the date of entry into force of the WTO Agreement with respect to the United States, to sumbit a report to the Congress on the extent to which Canada is complying with its obligations under the Uruguay Round agreements with respect to dairy and poultry products, and with its related obligations under the NAFTA.

Reasons for change

Section 424 reflects the Committee's concern over, and interest in, negotiations between the United States and Canada on the manner in which Canada will implement its obligations with respect to comprehensive tariffication and minimum market access under the Uruguay Round agreements in conjunction with its (Canada's) obligations with respect to tariff reduction under the NAFTA.

Section 425. Study of milk marketing order system

Present law

No provision.

Explanation of provision

Section 425 of H.R. 5110 requires the Secretary of Agriculture to conduct a study to determine the effects of the Uruguay Round agreements on the Federal milk marketing order system. This section also required the Secretary of Agriculture, not later than six months after the date of entry into force of the WTO Agreement with respect to the United States, to report to Congress on the results of the study.

Reasons for change

The study and report required under section 425 are aimed at addressing the uncertainty about the effects of the Uruguay Round agreements, particularly the tariffication of quantitative restrictions on milk imports into the United States, on the Federal milk marketing order system.

SUBTITLE D—GENERAL EFFECTIVE DATE

Section 451. General effective date

Present law

No provision.

Explanation of provision

Section 451 establishes as the effective date of amendments made by Title IV the date of entry into force of the WTO Agreement with respect to the United States, unless otherwise provided.

Reasons for change

This provision is necessary to clarify the effective date of the amendments made by Title IV.

TITLE VI—RELATED PROVISIONS

SUBTITLE A—EXPIRING PROVISIONS

Section 601. Generalized system preferences

Present law

Title V of the Trade Act of 1974, as amended, authorizes the President to grant preferential duty-free treatment (Generalized System of Preferences) on imports of eligible articles from designated beneficiary developing countries, subject to specific conditions and limitations. Section 505(a) of the 1974 Act provides that no duty-free treatment under Title V shall remain in effect after September 30, 1994.

Explanation of provision

Section 601 or H.R. 5110 amends section 505(a) of the Trade Act of 1974 to authorize a 10-month extension of GSP duty-free treatment through July 31, 1995. it also provides, notwithstanding section 514 of the Tariff Act of 1930 or any other provision of law, for liquidation or reliquidation as duty-free of the entry (including withdrawal from warehouse for consumption) of any article made after September 30, 1994, and before date of enactment to which GSP duty-free treatment would have applied, and for the refund by the Secretary of the Treasury of any duty paid. Such retroactive duty-free treatment shall be made only if a request is filed with the Customs Service within 180 days after the date of enactment that contains sufficient information to enable Customs to locate the entry, or to reconstruct the entry if it cannot be located.

Reasons for change

Section 601 ensures continuation of an expiring program until the Congress can give further consideration to legislative and administrative reforms next year. The Committee expects the Administration to fulfill the commitments described in the Statement of Administrative Action regarding review of "reverse preferences", South Africa innersprings, and product petitions and reviews during this extension period.

Preferential duty-free treatment under the GSP program has proven over the past 10 years to be a valuable tool for promoting the economic development of developing countries, as well as a useful form of leverage to promote U.S. trade policy objectives of foreign market access and integration of developing countries into the international trading system. The program also promotes the competitiveness of businesses producing in the United States by reducing costs of imported components, while the limits on duty-free treatment safeguard industries from adverse competition. The Committee has received considerable written correspondence in support of the program.

Section 602. U.S. insular possessions

Present law

Additional U.S. Note 5(h) to chapter 91 of the HTS sets forth the production incentive certificate (PIC) program for watch assemblers in the U.S. Virgin Islands, Guam, and American Samoa, which is due to expire on January 1, 1995. This program allows certificate holders to claim duty refunds for watches and parts imported from any source into the U.S. customs territory.

Explanation of provision

Section 602 of H.R. 5110 amends additional U.S. Note 5(h)(i) to chapter 91 of the HTS to extend the PIC program for 12 years until January 1, 2007. The certificate number PIC–EV–89, issued jointly by the Secretary of Commerce and Secretary of the Interior, shall be deemed to have been reissued on date of enactment for one year in the amount of the balance remaining.

Reasons for change

Section 602 ensures continuation of an expiring program of important economic significance to several U.S. insular possessions. Among other things, continuation of this expiring program will ensure that watch assemblers in these possessions are not placed at any further disadvantage in competition with foreign watch assemblers, beyond that which may result from U.S. tariff concessions in the Uruguay Round on watches and watch movements. Implementation of these concessions, in combination with expiration of this program, would likely have significant adverse economic consequences for these U.S. possessions. Continuation of this expiring program will minimize any adverse effects from the U.S. tariff concessions.

SUBTITLE B—CERTAIN CUSTOMS PROVISIONS

Section 611. Reimbursements from Customs user fee account

Present law

The Customs Overtime Pay Reform Act (COPRA), enacted as section 13811 of the Omnibus Budget Reconciliation Act of 1993, amended the Consolidated Omnibus Reconciliation Act of 1985 (COBRA) to provide reimbursement of Customs inspector premium pay, to the extent that it was greater than premium pay (i.e., for weeknights, Sundays, and holidays) already authorized by the Federal Employee Pay Act (FEPA).

Explanation of provision

Section 611 of H.R. 5110 would provide for reimbursement of Customs inspector premium pay to the extent it is greater than FEPA premium pay (i.e., week nights) authorized to be paid to Customs inspectors prior to enactment of COPRA.

Reasons for change

The provision corrects a technical error in COPRA which would prevent the Customs Service from reimbursing Customs inspector premium pay for Sundays and holidays worked as a part of a regular work week. Without this correction, Customs would incur an unanticipated burden on their Salaries and Expenses (S&E) appropriation of between $5 and $12 million annually. Such a result would not only hamper Customs' ability to enforce U.S. Trade Laws, but would also affect the implementation of the GATT Uruguay Round. In reporting COPRA in 1993, the Committee intended that Customs not reimburse its Salaries and Expenses Account for premium pay under FEPA, which only applied to week nights, since Sundays and holidays were defined by law as overtime. However, COPRA inadvertently did not limit the FEPA offset to just week nights, creating the problem corrected by the provision.

The amendment shall apply to premium pay earned by Customs inspectors on or after January 1, 1994.

Section 612. Merchandise processing fees

Present law

Under section 13031 of the COBRA, the Customs Service charges a user fee to cover the cost of its commercial processing operations. The receipts from the fee cannot exceed the expenditures for such operations. For formal entries, the rate of the fee is set administratively by the Secretary of the Treasury, but must be within the range from .15 percent to .19 percent ad valorem. Notwithstanding the ad valorem rate, current law also provides that the maximum amount that may be charged for a formal entry is $400 and the minimum amount that may be charged for such an entry is $21. The fees for an informal entry or release are established at $2 for automated entries not prepared by Customs, $5 for a manual entry or release not prepared by Customs, and $8 for an entry or release, either automated or manual, prepared by Customs. No fee applies to merchandise originating in Canada. The fee may not be increased on merchandise originating in Mexico after December 31, 1993, and no fee applies with respect to Mexico after June 29, 1999.

Explanation of provision

Section 612 of H.R. 5110 provides for an increase in the current merchandise processing fee rate for formal entries to .21 percent ad valorem and increases the cap on the range of such rate from .19 percent to .21 percent ad valorem. Notwithstanding the ad valorem rate, the bill also increases the maximum and minimum amounts of the merchandise processing fee to be collected for a formal entry from $400 to $485 and from $21 to $25, respectively, and provides authorization for the Secretary of the Treasury to adjust these maximum and minimum amounts to the extent that they exceed the expenditures for such operations. Rates for informal entries or releases would be increased from $5 to $6 for those not prepared by Customs and from $8 to $9 for those prepared by Customs. The provision does not affect the existing limitations on the user fee for goods originating in Canada and Mexico.

Reasons for change

As a result of the Uruguay Round negotiations, the Customs Service will have added responsibilities for implementing the provisions of the agreements. Further, a redesign of Customs' Automated Commercial System is necessary to meet the responsibilities under the Uruguay Round, as well as other commercial requirements, such as implementing the NAFTA textile enforcement initiative. The proposed increases in the merchandise processing fee will cover actual additional costs resulting from the operational initiatives, and other commercial costs which are not now being fully offset. To collect an amount commensurate with Customs' actual commercial costs, the ad valorem rate and the maximum and minimum fees for formal entries, and flat rates for informal entries and releases, are being adjusted.

This provision is in full compliance with existing U.S. obligations to Canada and Mexico under the U.S.-Canada FTA and NAFTA, and will have no effect on the application of the fee to goods originating in Canada and Mexico.

As a result of its ongoing oversight activities, the Committee remains concerned that Customs may not have adequate cost accounting capabilities. As a result, Customs may not be able to present as accurate a representation as possible of the costs of its merchandise and passenger processing operations, and its new trade enforcement activities. Customs must make improvements to its basic cost accounting capabilities as soon as possible, and use that information to develop future budget and user fee figures. The

Committee directs Customs to develop firm deadlines for meeting that goal, and provide the Committee with periodic status reports.

The amendments apply to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 1995.

SUBTITLE C—CONFORMING AMENDMENTS

Section 621. Conforming amendments

Section 621 of H.R. 5110 contains nine conforming amendments to various U.S. trade laws to replace references to the GATT and associated GATT instruments with references to the WTO Agreement and relevant agreements in its annexes, and otherwise to reflect U.S. participation in the WTO. These amendments will take effect on the date the WTO Agreement enters into force for the United States.

TITLE VII. REVENUE PROVISIONS

SUBTITLE A. WITHHOLDING TAX PROVISIONS

1. Withholding on distributions of Indian casino profits to tribal members (sec. 701 of the bill and new sec. 3402(r) of the Code)

Present law

Generally, Indian tribes are not subject to Federal income tax on their income. In ordinary matters not governed by treaties or remedial legislation, however, Indians are subject to the payment of Federal income tax as are other citizens.

Gaming activities conducted by Indian tribes are classified in 25 U.S.C. 2703. Class I gaming activities are social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in as part of tribal ceremonies. Class II gaming activities generally are bingo, games similar to bingo (e.g., pull tabs, punchboards, tip jars, and instant bingo) and card games either (1) explicitly authorized by the State or (2) not explicitly prohibited by the State, played at any location in the State, and conducted in conformity with any State regulations regarding periods of operation or wagering limitations. Class II gaming activities do not include any banking card games (e.g., baccarat, chemin de fer, or blackjack), slot machines or any electronic or electromagnetical facsimiles of games of chance. Class III gaming activities are all forms of gaming that are not classified as Class I or Class II.

Net revenue from certain gaming activities conducted or licensed by an Indian tribe may be used to make taxable distributions to members of the Indian tribe. The tribe must notify its members of the tax liability at the time the payments are made. 25 U.S.C. 2710(b)(3) and (d)(1). The tribe is not required to withhold on such payments except to the extent backup withholding rules apply under Code section 3406.

Reasons for change

Distributions of net revenues from gaming activity by an Indian tribe may result in significant tax liability to the tribe's members. Establishing withholding on such payments will more closely match estimated tax payments to ultimate tax liability. For some tribal members, this change may eliminate the need to make quarterly estimated tax payments. For others, it will reduce the likelihood that they will face penalties for underpayment of tax at the time of tax filing.

Explanation of provision

An Indian tribe that distributes net revenues from gaming activities (except for class I gaming activities as defined in 25 U.S.C. 2703(6) as in effect on the date of enactment of this provision) to its members is required to withhold on such payments in accordance with the following schedule:

(1) The withholding rate is zero to the extent the payment, when annualized, does not exceed the sum of one personal exemption and the standard deduction for a single person for the calendar year in which the payment is made;

(2) The withholding rate is 15 percent to the extent the payment, when annualized, exceeds the amount determined under (1) but does not exceed the sum of that amount and the amount of taxable income to which, in the case of a single person, the 15 percent tax rate would apply for the calendar year in which the payment is made;

(3) The withholding rate is 28 percent to the extent the payment, when annualized, exceeds the amount determined under (2) but does not exceed the sum of that amount and the amount of taxable income to which, in the case of a single person, the 28 percent tax rate would apply for the calendar year in which the payment is made;

(4) The withholding rate is 31 percent to the extent the payment, when annualized, exceeds the amount determined under (3).

Alternatively, at the election of an Indian tribe, the tribe is allowed to withhold on such payments in accordance with such tables or computational procedures as the Secretary may prescribe.

Effective date

The provision is effective for payments made after December 31, 1994.

2. Voluntary withholding on certain Federal payments and on unemployment compensation (sec. 702 of the bill and secs. 3304 and 3402(p) of the Code)

Present law

Taxpayers may not have income taxes voluntarily withheld from Social Security payments or other taxable Federal payments (e.g., crop disaster payments, Commodity Credit Corporation loans). Any amount received under a Federal or State law that is in the nature of unemployment compensation is includible in the gross income of an individual (Code sec. 85). In general, there is no withholding on unemployment compensation under present law.

Under code section 3402(o)(1)(A), any supplemental unemployment compensation benefits paid to an individual are subject to withholding as if they were wages paid by the employer to the employee for a payroll period. Supplemental unemployment compensation benefits are defined as amounts paid to an employee (pursuant to a plan to which the employer is a party) because of the employee's involuntary separation from employment directly resulting from a reduction in force, plant closing, or similar condition, but only to the extent that the benefits are includible in the employee's gross income.

Reasons for change

Some taxpayers find it burdensome to make quarterly estimated tax payments. These taxpayers may find it more convenient to elect to have Federal Taxes withheld at the time specified payments are made to them.

Explanation of provision

Certain Federal payments.—The bill requires that taxpayers who receive specified Federal payments be given the option of requesting that the Federal agency making the payments withhold Federal income taxes from the payments. Specified Federal payments subject to the withholding option include (1) Social Security benefits; (2) crop disaster payments; (3) Commodity Credit Corporation loans; and (4) other Federal payments specified by the Secretary of the Treasury. Where a taxpayer requests that the Federal agency making the payments withhold Federal income taxes, the taxpayer would also select the percentage of the payment that is to be withheld. The taxpayer may select withholding at 7 percent, 15 percent, 28 percent, or 31 percent. Treasury regulations may also specify additional percentage rates for withholding. Federal agencies making the payments will not receive any additional information regarding the taxpayer's income as a consequence of this provision.

Unemployment compensation benefits.—The bill also requires States to allow recipients of unemployment benefits to elect to have Federal income tax withholding from their benefits at a 15-percent rate. The bill also permits (but does not require) States to allow applicants for unemployment benefits to elect to have State and local income tax withholding from their benefits. Administrative expenses for which States can be reimbursed pursuant to section 302 of the Social Security Act could include the cost of conducting Federal income tax withholding.

Effective date

The provision is effective for payments made after December 31, 1996.

SUBTITLE B. PROVISIONS RELATING TO ESTIMATED TAXES AND PAYMENTS AND DEPOSITS OF TAXES

1. *Treatment of subpart F and section 936 income of taxpayers using the annualized method for estimated tax (sec. 711 of the bill and secs. 6654(d)(2) and 6655(e) of the Code)*

Present law

Estimated tax rules—in general.—Taxpayers are subject to an addition to tax for any underpayment of estimated tax. A corporation does not have an underpayment of estimated tax if it makes four equal, timely estimated tax payments that total at least 100 percent of the tax liability shown on its return for the current taxable year. A corporation that is not a "large corporation" (i.e., one that did not have taxable income of $1 million or more for any of the three preceding taxable years) generally may avoid the addition to tax if it makes four timely estimated tax payments each equal to at least 25 percent of the tax liability shown on its return for the preceding taxable year. In addition, any corporation may base its first quarterly installment on its prior-year tax liability in order to avoid the addition to tax with respect to that installment.

Individuals generally do not have an underpayment of estimated tax if they make timely estimated tax payments that are at least equal to (1) 100 percent of the tax shown on the individual's return for the preceding year, or (2) 90 percent of the tax shown on the return for the current year. A safe harbor of 110 percent of last year's liability applies, in lieu of the general 100-percent safe harbor, if the taxpayer had adjusted gross income of more than $150,000 for the prior taxable year.

Estimated tax installments based on annualized income.—If estimated tax installments fall short under the foregoing rules, a taxpayer may nevertheless be treated as not having an underpayment of estimated tax if the installments are based on a fraction of the "annualized" amount of income earned over a specified period (within the current taxable year) that ends before the due date of the installment. For individuals, annualization periods end with the month ending immediately before the estimated tax installment due date. For corporations, annualization periods exclude the last month of the corporation's taxable year.

Taxable income is placed on an annualized basis under regulations prescribe by the Secretary of the Treasury. Treasury regulations provide guidelines for the treatment of certain partnership items by individuals (Treas. Reg. sec. 1.6654–2(d)(2)). Under the regulation, in determining an individual's taxable income for an annualization period, an individual partner must take into account certain partnership items for any partnership taxable year ending with or within the partner's taxable year to the extent these items are attributable to months in the partnership taxable year preceding the installment due date.[1]

Subpart F inclusions.—Under the rules of subpart F (Code secs. 951–964), if a U.S. shareholder owns the stock of a controlled foreign corporation[2] on the last day of the corporation's taxable year,

[1] The regulation provides an example of a calendar-year taxpayer who is a member of a partnership with a taxable year that ends on June 30. In determining taxable income for purposes of computing the installment due on April 15, 1973, the example states that the taxpayer must take into account his distributive share of partnership items for the period July 1, 1972 (the beginning of the partnership taxable year that ends in 1973) through March 31, 1973 (the end of the annualization period for the April 15, 1973 installment date). In determining taxable income for purposes of computing the installment due on June 15, 1973, the taxpayer must take into account his distributive share of partnership items for the period July 1, 1972, through May 31, 1973 (the end of the annualization period for the June 15, 1973 installment date). In determining taxable income for purposes of computing the installment due on September 15, 1973, the taxpayer must take into account his distributive share of partnership items for the period July 1, 1972, through June 30, 1973 (the date on which the partnership taxable year ends).

[2] A controlled foreign corporation generally is defined as any foreign corporation if more than 50 percent of (1) the total combined voting power of all classes of its stock entitled to vote, or (2) the total value of its stock, is owned (directly, indirectly, or constructively) by U.S. shareholders. For this purpose, the term "U.S. shareholder" generally means a U.S. person who owns (di-

Continued

then the U.S. shareholder may be required to include in its own income certain income or earnings of the controlled foreign corporation. For purposes of computing required installments of estimated tax under the annualization method, the IRS has ruled that a taxpayer may treat certain income inclusions under subpart F as income actually earned by the U.S. shareholder on the last day of the controlled foreign corporation's taxable year.[3] The ruling involved a U.S. corporation that owned all of the stock of a number of controlled foreign corporations. All of the corporations involved used the calendar year as their taxable years. As a result, the U.S. shareholder was not required to take its pro-rata share of subpart F income into account in determining its estimated tax installments based on the annualization method.

Inclusions pursuant to section 936(h).—Certain domestic corporations with business operations in the U.S. possessions may elect the use of the section 936 credit. This credit generally eliminates some or all of the U.S. tax on certain income related to their operations in the possessions. If such a corporation (a "936 corporation") is to receive the full benefit of the section 936 credit, and the business operations in the possession related to certain types of intangible property, then certain shareholders and affiliates of the 936 corporation generally must include in their taxable incomes certain amounts relating to income from the intangible property, either under a general rule that requires all intangible property income to be allocated to the corporation's U.S. shareholders, or under either a profit-split or cost-sharing approach.

Intangible property income inclusions of a 936 corporation's shareholders or amounts allocated to shareholders or affiliates under either the profit-split or the cost-sharing rules may be deemed to occur either at the close of the 936 corporation's taxable year, or on the last day of the taxable year of the shareholder or affiliate in which or with which the taxable year of the 936 corporation ends. Accordingly, in some cases, a shareholder or affiliate of a 936 corporation may utilize the annualization method to avoid penalties for underpayment of estimated tax, yet delay paying tax on intangible property income inclusions until as late as the due date of its annual tax return.

Reasons for change

It is believed that subpart F income inclusions with respect to a controlled foreign corporation and intangible property income inclusions with respect to a 936 corporation should be taken into account for purposes of estimated tax installments based on annualized income. This would provide similar treatment for these specific types of income as for other types of income.

However, it is recognized that the determinations necessary to properly estimate the amounts of these income inclusions for the current taxable year may be difficult. Accordingly, it is believed appropriate to provide safe harbors, based on income inclusions in prior taxable years, to be used for estimating inclusions of subpart F income and of section 936 intangible property income.

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rectly, indirectly, or constructively), at least 10 percent of the total combined voting power of all classes of voting stock of the foreign corporation.

[3] PLR 9233001 (April 28, 1993).

Explanation of provision

In general.—The bill changes the treatment of inclusions under subpart F and inclusions of section 936 intangible property income for taxpayers that pay estimated tax installments based on the annualized-income method.

Under the bill, amounts includible under subpart F are taken into account for estimated tax purposes in a manner similar to the manner under which items of partnership income are taken into account. Foreign tax credits allocable to such inclusions under subpart F also are taken into account for estimated tax purposes similarly to tax credits allocable to partnership income inclusions. It is intended that foreign tax credits allocable to current-year subpart F inclusions be taken into account for estimated tax purposes under the annualized-income method, notwithstanding the fact that all requirements may not be satisfied for the accrual of the foreign taxes (because the controlled foreign corporation's taxable year for foreign tax purposes may not yet have closed).

Similarly, under the bill, intangible property income, profit-split amounts, and cost-sharing amounts includible in taxable income under section 936 are taken into account for estimated tax purposes in a manner similar to the manner under which items of partnership income are taken into account.

To compute the annualized income installment for a particular taxable year of the taxpayer, the taxpayer is required, under the bill, to take into account items that arise during the taxable year of the controlled foreign corporation or 936 corporation that is relevant to the final computation of tax for that taxable year of the *taxpayer*. However, to compute any particular installment, there is generally taken into account only those items that arise during that portion of such taxable year of the controlled foreign corporation or 936 corporation that precedes the close of the taxpayer's annualization period. It is anticipated that, in prescribing rules for determining amounts on an annualized basis, the Secretary may provide, where appropriate, for the computation of items of income under subpart F or section 936 based on facts in existence for that period.

Thus, under the bill, estimated tax payments generally will be required to be made throughout the year for subpart F inclusions and certain amounts includible under section 936 for the year.

Prior-year safe harbor.—For purposes of estimating subpart F income inclusions and section 936 intangible property income, profit-split amounts, and cost-sharing amounts under the annualized-income method, the bill permits taxpayers to use a safe harbor based on a certain percentage of amounts included in taxable income under subpart F and section 936 as shown on the taxpayer's returns for its first or second preceding taxable years. Under the prior-year safe harbor, subpart F amounts that were included in income in the relevant prior year, along with credits allocable to such inclusions, are treated for estimated tax purposes as earned ratably during the current taxable year. The relevant prior year is the second preceding year in the case of the first and second quarterly installments, and the first preceding year in the case of the third and fourth quarterly installments.[4] Similarly, under the prior-year safe harbor, intangible property income inclusions of a 936 corporation's shareholders for the relevant prior year and amounts allocated to shareholders or affiliates under either the profit-split or the cost-sharing rules for that year are treated for estimated tax purposes as earned ratably during the current taxable year.

In the case of a corporate taxpayer, the safe harbor for subpart F inclusions and section 936 inclusions generally is based on 115 percent of the relevant prior-year inclusions. However, the safe harbor is based on 100 percent of the relevant prior-year inclusions with respect to any controlled foreign corporation or 936 corporation that the taxpayer does not control as of the beginning of the taxpayer's current taxable year. The taxpayer is treated as controlling a corporation for this purpose if it owns (directly or indirectly, within the meaning of sec. 958(a)) or is treated as owning (constructively, within the meaning of sec. 958(b)) more than 50 percent (by vote or value) of the stock in the corporation.

In the case of an individual taxpayer, the safe harbor is based on 100 percent of the relevant prior-year inclusions.

A taxpayer may elect annually whether or not to use the safe harbor for subpart F and section 936 inclusions. Such an election will apply to all such inclusions of the taxpayer.[5]

Effective date

The provision is effective for purposes of determining estimated tax payments for taxable years beginning after December 31, 1994.

2. *Time for payments and deposits of certain excise taxes (sec. 712 of the bill and secs. 5061, 5703, and 6302 of the Code)*

Present law

Federal excise taxes are imposed on a variety of products and services, including the following: alcoholic beverages; tobacco products; firearms; telephone service; air transportation (passengers and freight); highway, rail, aviation, and inland waterway fuels; crude oil, certain chemicals, certain imported chemical substances, and certain ozone-depleting chemicals; ship passenger charges; coal; childhood vaccines; and certain automobiles.

Subject to limited exceptions,[6] these excise taxes must be remitted to the Federal Government on a semi-monthly basis, generally within a period of nine to 30 days after the end of the semi-monthly period.

Reasons for change

Requiring excise taxes that must be deposited on a semi-monthly basis to be deposited during the fiscal year to which the taxes relate would provide substantial additional revenue without imposing

[4] Under the annualized income method, the third quarterly payment will take into account any differences between the income inclusions shown on the taxpayer's return for the second preceding year and such amounts for the taxpayer's first preceding year.

[5] In the case of a taxpayer that files a consolidated return, the election will apply to all subpart F and section 936 inclusions of all members of the affiliated group.

[6] For example, small wine producers (generally producers who paid less than $1,000 of wine excise tax during the preceding calendar year) may pay the wine excise tax on an annual basis by remitting the tax for the calendar year within 30 days after its end.

significant burdens on taxpayers or on the service providers charged with collecting the taxes.

Similarly, a requirement that alcohol and tobacco excise taxes be paid during the fiscal year to which the taxes relate would provide substantial additional revenue over the budget period without imposing significant burdens on taxpayers.

Explanation of provision

In the case of excise taxes that must be remitted to the Federal Government on a semi-monthly basis, the bill accelerates the due date for deposit of taxes for the period September 16 through September 26 to September 29 (rather than in October, which is in the subsequent fiscal year). Special rules apply to the taxes on ozone-depleting chemicals, communications services, and air transportation. In the case of the tax on ozone-depleting chemicals, deposits of taxes for the second semi-monthly period in August and for the period beginning on September 1 and ending on September 11 are due on or before September 29. In the case of communications services and air transportation taxes deposited on the basis of amounts considered collected, the tax included in amounts billed or tickets sold during the period beginning on September 1 and ending on September 11 must be deposited on or before September 29. It is expected that the Treasury Department will modify existing regulatory safe harbors relating to excise tax deposits to reflect these changes.

In the case of taxes on distilled spirits, wine and beer, and on tobacco products and cigarette papers and tubes, the tax for the period beginning on September 16 and ending on September 26 is due on or before September 29. Under a safe harbor, however, this requirement is satisfied if the taxpayer pays an amount equal to 11/15th of the taxpayer's liability for the first semi-monthly period in September. The new requirement does not apply to wine excise taxes that are remitted on an annual basis.

If September 29 is a Saturday, deposits and payments of taxes otherwise due on that date are due on or before September 28. If September 29 is a Sunday, deposit and payments of taxes otherwise due on that date are due on or before September 30.

Special rules apply to taxpayers that are not required to remit taxes by electronic funds transfer for the calendar year. For those taxpayers, deposits of taxes for the period beginning on September 16 and ending on September 25 are due on or before September 28. In addition, the other rules described above are modified to reflect the shorter deposit period and earlier due date applicable to such taxpayers.

Effective date

The provision is generally effective on January 1, 1995, for taxes other than the taxes on air transportation, and on January 1, 1997, for the commercial air passenger and freight excise taxes (secs. 4261 and 4271).

3. Reduction in rate of interest paid on certain corporate overpayments of tax (sec. 713 of the bill and sec. 6621 of the Code)

Present law

The rate of interest that the IRS pays to taxpayers on overpayments of tax is the sum of the Federal short-term rate plus 2 percentage points (sec. 6621(a)(1)).

Reasons for change

Distortions may result if the rates of interest in the Code differ appreciably from market rates. Reducing the overpayment rate for large corporate overpayments of taxes will reduce the possibility of distortions.

Explanation of provision

The overpayment rate is reduced to the sum of the Federal short-term rate plus one-half percentage point for any portion of an overpayment of tax by a corporation for a taxable period that exceeds $10,000. (The overpayment rate is the same as under present law for the first $10,000 of any overpayment of tax by a corporation.) The provision applies to all types of taxes.

Under present law, the Secretary of the Treasury has the authority to credit the amount of any overpayment against any liability under the Code (sec. 6402). To the extent a portion of tax due is satisfied by a credit of an overpayment, no interest is imposed on that portion of the tax (sec. 6601(f)). The Secretary should implement the most comprehensive crediting procedures under section 6402 that are consistent with sound administrative practice, and should do so as rapidly as is practicable.

Effective date

The provision is effective for purposes of determining interest for periods after December 31, 1994, regardless of the taxable period (if any) to which the underlying tax may relate.

SUBTITLE C. EARNED INCOME TAX CREDIT PROVISIONS

Present law

In general.—Eligible low-income workers are able to claim a refundable earned income tax credit (EITC). The amount of the credit an eligible taxpayer may claim depends upon whether the taxpayer has one, more than one, or no qualifying children and is determined by multiplying the credit rate by the taxpayer's earned income up to an earned income threshold. The maximum amount of the credit is the product of the credit rate and the earned income threshold. For taxpayers with earned income (or adjusted gross income, if greater) in excess of the phaseout threshold, the credit amount is reduced by the phaseout rate multiplied by the amount of earned income (or adjusted gross income, if greater) in excess of the phaseout threshold. The credit is not allowed if earned income (or adjusted gross income, if greater) exceeds the phaseout limit.

The parameters for the EITC depend upon the number of qualifying children the taxpayer claims. For 1994 the parameters are as follows:

	One qualifying child	Two or more qualifying children	No qualifying children
Credit rate (percent)	26.30	30.00	7.65
Phaseout rate (percent)	15.98	17.68	7.65
Earned income threshold	$7,750	$8,425	$4,000
Maximum credit	$2,038	$2,528	$306
Phaseout threshold	$11,000	$11,000	$5,000
Phaseout limit	$23,753	$25,299	$9,000

The earned income threshold and the phaseout threshold are indexed for inflation; because the phaseout limit depends on those amounts, the phaseout rate, and the credit rate, the phaseout limit will also increase if there is inflation. Earned income consists of wages, salaries, other employee compensation, and net self-employment income.

The credit rates and phaseout rates for the EITC change over time under present law, as shown in the following table.

Year	One qualifying child—		Two or more qualifying children—		No qualifying children—	
	Credit rate	Phaseout rate	Credit rate	Phaseout rate	Credit rate	Phaseout rate
1994	26.30	15.98	30.00	17.68	7.65	7.65
1995	34.00	15.98	36.00	20.22	7.65	7.65
1996 and after	34.00	15.98	40.00	21.06	7.65	7.65

In order to claim the EITC, a taxpayer must either have a qualifying child or must meet other requirements. A qualifying child must meet a relationship test, an age test, and a residence test. Part of the residence test requires that a qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the taxable year (for the entire taxable year in the case of a foster child), and that this principal place of abode must be located in the United States.

In order to claim the EITC without a qualifying child, a taxpayer must not be a dependent and must be over age 24 and under age 65. In addition, the taxpayer's principal place of abode must be located in the United States for more than one-half of the taxable year.

Nonresidents and the EITC.—The EITC may be claimed by a taxpayer meeting the above requirements regardless of whether the taxpayer is a U.S. citizen, a resident alien, or a nonresident alien.

Section 7701(b) defines a resident alien for income tax purposes. Aliens who do not meet this definition are nonresident aliens. For income tax purposes, an individual is generally considered a resident if the individual:

(1) has entered the United States as a lawful permanent U.S. resident (the "green card test"); or

(2) is present in the United States for 31 or more days during the current calendar year and has been present in the United States for 183 or more days during a three-year period weighted toward the present year (the "substantial presence test"). (An individual who is present in the United States for fewer than 183 days and establishes that he has a closer connection with a foreign country than with the United States is generally not subject to tax as a resident alien on account of the substantial Presence test.)

A nonresident alien may elect to be taxed as a resident alien if one of several elections is made:

(1) Under section 6013(g), a nonresident alien who is married to an individual who is either a citizen or resident alien of the United States at year end may elect to be treated as a resident for the entire year. The election applies to the year for which it is made and all subsequent years until terminated. However, the election will be suspended if neither spouse is a U.S. citizen or resident at any time during a taxable year.

(2) An election under section 6013(h) to be taxed as a resident alien for the entire taxable year may be made by an individual who is a nonresident alien at the beginning of the year and a resident alien at the end of the year and who is married to an individual who is either a citizen or resident of the United States at year end. Thus, this election can be made by a foreign married couple who arrived in the United States during the taxable year and who are resident aliens at year end.

(3) Under section 7701(b)(4), an alien individual may make the so-called "first-year election" to be treated as a resident for a calendar year in which he individual is not otherwise treated as a U.S. resident. To qualify for this election, each of several requirements must be met. The individual must not have been a U.S. resident during the preceding year and must satisfy the substantial presence test for U.S. residency in the following calendar year. The individual must also be present in the United States for at least 31 consecutive days during the year to which the election applies, and be present in the United States, during the period beginning with the first day of that 31-day period and ending with the last day of the election year, for at least 75 percent of the days in that period. An individual who makes the first-year election is treated as a U.S. resident only for that portion of the year that begins on the first day of the period for which the individual satisfies both the 31day and the 75-percent tests.

1. Extension of the earned income tax credit to military personnel stationed outside the United States (sec. 721 of the bill and sec. 32 of the Code)

Reasons for change

By including on a W–2 the amount of nontaxable earned income paid during the year by the Department of Defense, the increased information reporting is intended to allow members of the Armed Forces claiming the EITC to determine more accurately the actual amount of EITC to which they are entitled.

Because present-law rules for the EITC require that the taxpayer (and the taxpayer's qualifying child, if any) maintain a principal place of abode within the United States for at least half of the taxable year, low-income members of the Armed Forces who are eligible to claim the EITC if stationed in the United States may not be eligible if stationed outside the United States while serving on extended active duty. The bill would allow members of the Armed Forces who would qualify for the EITC except for their extended active duty outside the United States to qualify for the EITC.

Explanation of provision

The bill requires that members of the Armed Forces receive annual reports from the Department of Defense of earned income (which includes nontaxable earned income such as amounts received as basic allowances for housing and subsistence).

The bill extends the EITC to United States military personnel stationed overseas. For purposes of determining whether a qualifying child meets the residence test, for any period during which a member of the Armed Forces is stationed outside the United States while serving on extended active duty, the member would be considered as maintaining a place of abode in the United States, thus satisfying the present-law requirement that the principal place of abode for a qualifying child and the member be in the United States. For purposes of determining whether an individual without a qualifying child meets the residence test, a member of the Armed Forces stationed outside the United States on extended active duty would be considered as maintaining a place of abode in the United States

Effective date

The increased information reporting is effective for remuneration paid after December 31, 1994. Extension of the EITC to members of the Armed Forces stationed overseas is effective for taxable years beginning after December 31, 1994.

2. Certain nonresident aliens ineligible for earned income tax credit (sec. 722 of the bill and sec. 32 of the Code)

Reasons for change

Because nonresident aliens generally are not required to report their foreign-source income on their U.S. individual income tax returns, it may be possible for some of them to qualify for the EITC on the basis of low U.S. earned income even when their worldwide income exceeds the income phaseout limits for the EITC. The bill prevents nonresident aliens from claiming the EITC unless they are married and agree to subject their worldwide income to U.S. individual income tax by virtue of making the election under sections 6013(g) or (h).

Explanation of provision

The bill makes individuals who are nonresident aliens for any portion of the taxable year ineligible to claim the EITC unless an election under Code section 6013(g) or (h) is in effect for the taxable year.

Effective date

The provision is effective for taxable years beginning after December 31, 1994.

3. Income of prisoners disregarded in determining earned income tax credit (sec. 723 of the bill and sec. 32 of the Code)

Reasons for change

The EITC is designed to alleviate poverty and to provide work incentives to low-income individuals. Because of the compulsory nature of much of the work performed by prison inmates, it does not further the objectives of the EITC to include in earned income for EITC calculations any amounts paid for inmates' services.

Explanation of provision

The bill removes from the definition of earned income in section 32(c)(2) any amount received for services provided by an individual while the individual is an inmate at a penal institution.

Effective date

The provision is effective for taxable years beginning after December 31, 1993.

SUBTITLE D. PROVISIONS RELATING TO RETIREMENT BENEFITS

1. Treatment of excess pension assets used for retiree health benefits (sec. 731 of the bill and sec. 420 of the Code)

Present law

Under present law, defined benefit pension plan assets generally may not revert to an employer prior to the termination of the plan and the satisfaction of all plan liabilities. Certain procedural requirements also must be met. Any assets that revert to the employer upon such termination are includible in the gross income of the employer and subject to an excise tax. The rate of the excise tax varies depending upon whether or not the employer maintains a replacement plan or makes certain benefit increases, and can be as high as 50 percent of the amount of the reversion. Upon plan termination, the accrued benefits of all plan participants are required to be 100-percent vested.

Under present law, a pension plan may provide medical benefits to retirees through a section 401(h) account that is part of such plan. Present law permits certain qualified transfers of excess assets from the pension assets in a defined benefit pension plan (other than a multiemployer plan) to the section 401(h) account that is a part of such plan to pay for qualified current retiree health liabilities. The assets transferred are not includible in the gross income of the employer and are not subject to the excise tax on reversions.

Assets transferred in a qualified transfer cannot exceed certain limits. The amount that can otherwise be transferred as reduced by amounts previously contributed to a health benefits account or welfare benefit fund to pay for the qualified current retiree health liabilities. The transferred assets (and any income thereon) are required to be used to pay qualified current retiree health liabilities (either directly or through reimbursement) for the taxable year of the transfer. Transferred amounts are generally required to benefit all participants in the pension plan who are entitled upon retirement to receive retiree medical benefits (other than key employees) through the section 401(h) account. Retiree health benefits of key employees may not be paid (directly or indirectly) our of transferred assets. In order for the transfer to be qualified, accrued retirement benefits under the pension plan must be nonforfeitable as if the plan terminated on the date of transfer.

Amounts not used to pay qualified current retiree health liabilities for the taxable year of the transfer are to be returned at the end of the taxable year to the general pension assets of the plan.

Under a maintenance of effort requirement, an employer that makes a transfer to a section 401(h) account from the defined benefit plan assets is required to maintain employer-provided retiree health expenditures for covered retirees at a minimum dollar level for the taxable year of the transfer and the following 4 taxable years. The minimum dollar level is he higher of the applicable employer costs for each of the 2 taxable years immediately preceding the taxable year of the transfer.

The provision permitting the transfer of excess pension assets to pay current retiree health benefits expires for taxable years beginning after December 31, 1995.

Reasons for change

It is appropriate to provide a temporary extension of the present-law rule permitting employers to transfer assets set aside for pension benefits to a section 401(h) account for retiree health benefits as long as the security of employees' pension benefits is not thereby threatened. In conjunction with the temporary extension of the provision, it is necessary to modify the maintenance of effort requirement to ensure that employers can take into account cost savings that are realized in the employer's health benefits plans.

Explanation of provision

The present-law provision permitting excess defined benefit pension plan assets to be used to provide retiree health benefits under a section 401(h) account is extended for 5 years, with a modification to the maintenance of effort requirement and a clarification of the rules relating to amounts previously set aside to pay qualified retiree health liabilities. Under the bill, the employer is required to maintain substantially the same level of employer-provided retiree health coverage for the taxable year of the transfer and the following 4 taxable years. The level of coverage that must be maintained will be based on coverage provided in the year immediately preceding the taxable year of the transfer. For purposes of determining whether there are excess assets in a defined benefit pension plan, the interest rates required to be used under the bill for purposes of minimum funding requirements would apply.

The bill clarifies how amounts that can otherwise be transferred are reduced by amounts previously set aside to pay retiree health liabilities. Under the bill, for transfers occurring after December 31, 1995, in determining qualified retiree health liabilities with respect to a taxable year, such liabilities are reduced by the percentage that the amounts previously set aside are the total future qualified retiree health liabilities. For example, assume that on December 31, 1995, and employer has a welfare benefit fund that has $2 million in assets to pay retiree health liabilities, the present value of future qualified retiree health liabilities is $10 million, and qualified retiree health liabilities for 1996 (without regard to any offset) are $1 million. In determining the amount that can be transferred in 1996, the $1 million is reduced by 20 percent. No inference is intended as to the proper reduction in transferred amounts under present law.

Effective date

The provision generally is effective with respect to taxable years beginning after December 31, 1995, and before January 1, 2001. The modification to the maintenance of effort requirement is effective for transfers occurring after the date of enactment.

2. Rounding rules for cost-of-living adjustments (sec. 732 of the bill and secs. 401(a)(17), 415, 402(g) and 408(k) of the Code)

Present law

Under present law, the dollar limit on benefits under a defined benefit pension plan ($118,800 for 1994), the limit on elective deferrals under a qualified cash or deferred arrangement ($9,240 for 1994), and the minimum compensation limit for determining eligibility for participation in a simplified employee pension (SEP) ($396 for 1994) are adjusted annually for inflation. The dollar limit on annual additions to a defined contribution plan is the greater of $30,000 or ¼ of the dollar limit for benefits under defined benefit pension plans. Thus, the dollar limit will be $30,000 until the defined benefit pension plan dollar limit exceeds $120,000. The dollar limit on annual compensation that generally may be taken into account for qualified plan purposes is $150,000. The $150,000 limit is indexed in $10,000 increments.

Reasons for change

In order to simplify the dollar limits applicable to qualified pension plans, it is necessary to modify the rounding rules so that the dollar limits are indexed in whole dollar increments ($5,000, $500, or $50). However, it is not appropriate to permit the modified rounding rules to reduce any dollar limit below its level under present law.

Explanation of provision

The provision provides that (1) the dollar limit on benefits under a defined benefit pension plan is indexed in $5,000 increments, (2) the dollar limit on annual additions under a defined contribution plan is indexed in $5,000 increments, (3) the limit on elective deferrals is indexed in $500 increments, and (4) the minimum compensation limit for SEP participation is indexed in $50 increments.[7] In addition, the provision provides that the cost-of-living adjustment with respect to any calendar year is based on the increase in the applicable index as of the close of the calendar quarter ending September 30 of the preceding calendar year so that the

[7] The provision also applies to limits that are indexed in the same manner as these limits or are based on these limits (e.g., the compensation threshold for purposes of determining highly compensated individuals under sec. 414(q) and the excess benefit limit under the excise tax on excess distributions under sec. 4980A.

adjusted dollar limits would be available before the beginning of the calendar year to which they apply. No limit is reduced below the limit in effect for plan years beginning in 1994.

Effective date

The provision is effective for years beginning after December 31, 1994.

3. Increase in inclusion of Social Security benefits paid to non-residents (sec. 733 of the bill and sec. 871(a)(3) of the Code)

Present law

Treatment of taxpayers generally.—A portion of Social Security and Railroad Retirement Tier 1 benefits is includible in gross income for taxpayers whose provisional incomes exceed a threshold amount (the "base amount"). For taxpayers whose provisional incomes exceed a second threshold amount (the "adjusted base amount"), a larger portion of such benefits is includible in gross income. For purposes of these computations, a taxpayer's provisional income includes modified adjusted gross income (adjusted gross income plus tax-exempt interest plus certain foreign source income) plus one-half of the taxpayer's Social Security or Railroad Retirement Tier 1 benefit. The base amount is $32,000 for married taxpayers filing joint returns, $25,000 for unmarried taxpayers, and $0 for married taxpayers filing separate returns. The adjusted base amount is $44,000 for married taxpayers filing joint returns, $34,000 for unmarried taxpayers, and $0 for married taxpayers filing separate returns.

If the amount of provisional income exceeds the base amount but does not exceed the adjusted base amount, then the amount of the inclusion is the lesser of (1) 50 percent of the taxpayer's Social Security or Railroad Retirement Tier 1 benefit, or (2) 50 percent of the excess of the taxpayer's provisional income over the base amount.

If the amount of provisional income exceeds the adjusted base amount, then the amount of the inclusion is the lesser of:

(1) 85 percent of the taxpayer's Social Security or Railroad Retirement Tier 1 benefit or

(2) the sum of:

(a) 85 percent of the excess of the taxpayer's provisional income over the adjusted base amount, plus

(b) the smaller of (i) the amount of benefits that would have been included if the 50-percent inclusion rule (the rule in the previous paragraph) were applied, or (ii) one-half of the difference between the adjusted base amount and the base amount of the taxpayer.

Beginning in 1983 (when benefits were included in income pursuant to the Social Security Amendments of 1983 (the "1983 Act")) and continuing until the Omnibus Budget Reconciliation Act of 1993 (the "1993 Act"), in all cases where provisional income was over the base amount, the amounts included were limited by the lesser of 50 percent of the taxpayer's benefits, or 50 percent of the excess of provisional income over the base amount.

Treatment of nonresident alien individuals.—If a nonresident alien individual is engaged in a trade or business within the United States during the taxable year, the individual is subject to tax under the Code, at the normal graduated rates, on net taxable income that is effectively connected with the conduct of the trade or business. U.S. source fixed or determinable annual or periodical income of a nonresident alien individual (for example, salary, wages, annuities, compensation, remuneration, and emoluments) that is not effectively connected with the subject to tax under the Code at a rate of 30 percent of the gross amount paid. This latter tax generally is collected by means of withholding (hence this tax is often called a "withholding tax"). Withholding taxes are often reduced or eliminated in the case of payments to residents of countries with which the United States has an income tax treaty.

Under rules that have been in the Code since the 1983 Act, for purposes of taxing the income of nonresident alien individuals, the income thresholds for including Social Security and Railroad Retirement Tier 1 benefits do not apply. Instead, 50 percent of any such benefit is included in gross income. Thus, a nonresident alien individual typically may be subject to U.S. withholding tax under the Code at an effective rate of 15 percent on the gross amount of U.S. social security benefits. This tax may be reduced or eliminated under some treaties. Although the 1993 Act increased the inclusion of benefits in some cases, for taxpayers other than nonresident aliens, to up to 85 percent of the benefits, the 1993 Act did not amend the rule that a nonresident alien individual is required to include 50 percent (and only 50 percent) of these benefits in gross income.

Reasons for change

It is believed that the maximum effective rate of U.S. taxation applicable to Social Security and Railroad Retirement Tier 1 benefits paid to nonresident aliens should not be less than the corresponding rate applicable to benefits paid to U.S. citizens and resident aliens. Accordingly, it is appropriate to raise the percentage of such benefits included in the gross income of a nonresident alien individual so that once again it will not be lower than the percentage applicable to a U.S. person with income over the applicable thresholds.

Explanation of provision

The provision increases from 50 percent to 85 percent the amount of Social Security or Railroad Retirement Tier 1 benefits included in the gross income of a nonresident alien individual. Thus, under the provision a nonresident alien individual may be subject to U.S. withholding tax under the Code at an effective rate of 25.5 percent on the gross amount of U.S. Social Security or Railroad Retirement Tier 1 benefits.

The provision does not impose tax contrary to any treaty obligation of the United States. Thus, in cases where taxation of such a benefit would conflict with an existing treaty, the treaty would continue to prevail.

Effective date

The provision would be effective for benefits paid after December 31, 1994, in taxable years ending after such date.

SUBTITLE E. OTHER PROVISIONS

1. Partnership distributions of marketable securities (sec. 741 of the bill and secs. 731 and 737 of the code)

Present law

Neither a partnership nor its partners generally recognize gain upon a distribution of partnership property to a partner (sec. 731(a)(1) and (b)). A partner is required to recognize gain, however, to the extent that the amount of money distributed exceeds the partner's basis in its partnership interest immediately before the distribution (sec. 731(a)(1)). Thus, in general, if a partnership distributes cash to a partner in an amount that exceeds the adjusted basis of the partner's interest in the partnership, the partner must recognize gain; but if the partnership distributes marketable securities to the partner in lieu of cash, the partner can defer recognizing gain.

A partner's basis in property distributed in a nonliquidating distribution is the lesser of the partnership's adjusted basis in the distributed property or the partner's adjusted basis in partnership interest (reduced by money distributed in the transaction) (sec. 732(a)). A partner's adjusted basis in its partnership interest is reduced by the amount of money and the basis of property distributed to him in a non-liquidating distribution (sec. 733).

In a liquidating distribution, the partner's basis in the distributed property equals the partner's basis in the partnership interest (reduced by money distributed in the transaction) (sec. 732(b)).

A partner that contributes appreciated property to a partnership is required to include pre-contribution gain in income to the extent that the value of other property distributed by the partnership to that partner exceeds its adjusted basis in its partnership interest (sec. 737). This rule applies if the distribution is made within 5 years after the contribution of the appreciated property.

Reasons for change

Concern has arisen that taxpayers can exchange interests in appreciated assets for marketable securities while deferring or avoiding tax on the appreciation, by using the present-law rules relating to partnership distributions. The present-law rules permit a partner to exchange, tax-free, his share of appreciated partnership assets for an increased share of the partnership's marketable securities. This transaction is the virtual economic equivalent of a sale of a partner's share of the partnership's assets. If the taxpayer were to exchange an interest in an appreciated asset for cash, he generally would recognize gain on the appreciated asset; yet if the taxpayer receives a partnership distribution of marketable securities, which are nearly as easily valued and as liquid as cash, he can avoid gain recognition.

This distinction in tax treatment between cash and marketable securities elevates form over substance, causes taxpayers to choose the form of transactions for tax reasons rather than economic reasons, and may not promote accurate income measurement. Rather, the present-law rule merely permits taxpayers to defer or avoid tax.

To limit the deferral or avoidance of taxation upon the receipt of marketable securities by a partner with unrealized appreciation in his partnership interest, the bill provides that the receipt of marketable securities in a partnership distribution causes the partner to recognize gain from the disposition of its partnership interest, to the extent that the value of the securities exceeds that partner's adjusted basis in its partnership interest. Thus, gain is recognized in the same manner, as if the partner had received money in lieu of securities.

Exceptions are provided under this rule. It is acknowledged that certain partnerships are formed for the purpose of holding marketable securities for investment or for sale to customers. Thus, an exception is provided in the case of a distribution of marketable securities by an investment partnership to a partner who did not contribute any property to the partnership other than money or securities or other similar property. In addition, it is not intended that a partner be taxed under the provision on the partnership's gain attributable to his share of the partnership's marketable securities distributed to him, because he has not exchanged his share of any other partnership asset for an increased share of the partnership's marketable securities. Thus, an exception (structured as a limitation on gain recognized under the provision) applies, to the extent that the gain that would otherwise be recognized under the provision does not exceed the distributee partner's share of the partnership's built-in gain (if any) with respect to securities of the type distributed to him. Further, the bill provides an exception for a distribution of marketable securities if the distributed security was contributed by the distributee partner (except to the extent that the value of the distributed security arises from marketable securities or money contributed to an entity to which the distributed security relates [8]). Finally, the bill provides regulatory authority to except distributions when the distributed security was not a marketable security when acquired by the partnership.

Because the partnership tax rules provide a great deal of flexibility, and taxpayers can arrange their affairs so as to take advantage of this flexibility, the bill grants to the Treasury Department regulatory authority to prescribe rules that effectively prevent taxpayers from avoiding the intent of this provision (as well as to provide relief from the application of the provision, where appropriate).

Explanation of provision

In general.—The bill generally provides that, for purposes of determining the amount of gain that a partner recognizes upon the distribution of marketable securities by a partnership, the fair market value of the securities is treated as money.[9] Thus, a partner

[8] A similar rule is provided under present-law sections 704(c)(1)(B) and 737(d)(1).

[9] While the bill generally (subject to the exceptions provided in the bill) treats marketable securities as money where the term money is used in sections 731(a)(1) and 737, the bill does not

generally recognizes gain under the provision to the extent that the sum of the fair market value of marketable securities and money received exceeds the partner's basis in its partnership interest.[10] The value of the marketable securities is their fair market value as of the date of the distribution.

Definition of marketable securities

In general.—Under the provision, marketable securities means financial instruments and foreign currencies that are, as of the date of the distribution, actively traded (within the meaning of section 1092(d)(1)). For purposes of the definition of marketable securities, a financial instrument includes financial products such as stocks and other equity interests, evidences of indebtedness, options, futures and forward contracts,[11] notional principal contracts and derivatives.

In addition, marketable securities include certain other specified items. First, the term includes any interest in a common trust fund or a regulated investment company (RIC) that is offering for sale or has outstanding any redeemable security (within the meaning of the Investment Company Act of 1940). Thus, an interest in an open-ended mutual fund is treated as a marketable security even though, for example, trading in fund shares takes place exclusively through purpose and redemption transactions with the issuer of the fund shares.

Second, marketable securities include any financial instrument that, pursuant to its terms or any other arrangement, is readily convertible into, or exchangeable for, money or marketable securities. For example, under this rule, an in-the-money option to buy marketable securities is treated as a marketable security because the holder can readily convert it to marketable securities by exercising the option.

Third, marketable securities include any financial instrument the value of which is determined substantially by reference to marketable securities. For example, a private notional principal contract that itself is not actively traded, but whose value is determined by reference to a financial instrument that is actively traded, is a marketable security. Similarly, an interest in an index fund that is not itself actively traded,[12] but whose value is determined by reference to an index of securities that are actively traded, is a marketable security. As a further example, privately offered stock whose value is determined by reference to actively traded stock of another class or another issuer, is a marketable security.

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change the treatment of marketable securities as property where the term property is used (for example, in determining a partner's net pre-contribution gain under sec. 737(b)).

[10] Under the provision, marketable securities are treated as money only for purposes of sections 731(a)(1) and 737. Marketable securities are not treated as money under other provisions, for example, section 731(a)(2). Any loss on the distribution of marketable securities is not recognized under the provision, but rather is deferred to the same extent it is deferred under present law, by virtue of the present-law rules providing generally for carryover and substituted basis, respectively, of property distribution other than in liquidation (sec. 732(a)) and of property distributed in liquidation (sec. 732(b)).

[11] Commodities (other than precious metals) are not treated as marketable securities under the provision; however, options and futures and forward contracts (whether or not relating to commodities) that are actively traded are treated as marketable securities.

[12] An interest in an index fund that is actively traded is a marketable security because it is included as a financial instrument.

Fourth, except to the extend provided in regulations, marketable securities include any interest in a precious metal which as of the date of the distribution is actively traded, unless the precious metal was produced, used, or held in the active conduct of a trade or business by the partnership. Thus, for example, monetized or unmonetized gold coins, and gold or silver ingots or bullion, are marketable securities, if they are not produced, used or held in the active conduct of a trade or business by the partnership.

Fifth, except as otherwise provided in regulations, an interest in any entity is a marketable security if substantially all of the assets of the entity consist (directly or indirectly) of marketable securities, money, or both. As under present law (secs. 704(c)(1)(B) and 737(d),[13] the provision may not be avoided by distributing interests in such an entity that are not actively traded. The entire interest in such an entity is intended to be treated as a marketable security under this rule, even if the entity (directly or indirectly) holds other assets.

Sixth, the bill provides limited regulatory authority permitting the Treasury Department to treat as a marketable security an interest in an entity, even though less than substantially all of the entity's assets (directly or indirectly) consist of marketable securities, money, or both. Such an interest in an entity may not, however, be treated under regulations as a marketable security except to the extend of the value of the interest that is attributable to marketable securities, money, or both.

Actively traded

The term actively traded has the same meaning as under Code section 1092(d). It is intended that Treasury regulations[14] interpreting the meaning of actively traded under section 1092(d) apply.

Exceptions.—The bill provides four exceptions to the general rule that gain is recognized upon a partnership distribution of marketable securities to the extent the sum of the value of the marketable securities and money distributed exceeds the partner's basis in its partnership interest.

Securities contributed by the distributee

The provision generally does not apply to the distribution of a marketable security to a partner if the security was contributed to the partnership by the partner. The provision does, however, apply, to the extent that the value of distributed security is attributable to marketable securities or money contributed (directly or indirectly) to the entity to which the distributed security relates. For example, if marketable securities are contributed by a partnership to a corporation (or lower tier subsidiary of a corporation) whose stock had been contributed to the partnership by a partner, the provision would apply to the distribution of stock of the corporation back to the contributing partner to the extent the value of such stock is attributable to the marketable securities or money contributed. The provision does not, however, apply (unless otherwise provided in regulations) to the extent that the value of an interest in

[13] See H. Rep. 102–1018, Conference Report to accompany H.R. 776, Energy Policy Act of 1992 at 429 (Oct. 5, 1992).

[14] Treas. Reg. 1.1092(d)–1, Oct. 8, 1993.

an entity contributed by the distributee partner is attributable to marketable securities or money that the distributee also contributed to the partnership.

Securities not marketable when acquired

To the extent provided in regulations, the provision does not apply to a distribution of a marketable security that was not a marketable security when the partnership acquired it. For example, under this regulatory authority, the application of the provision may be suspended, in the case of a distribution of stock of a corporation acquired by the partnership in a private placement, if the corporation subsequently went public and its stock is actively traded at the time the partnership distributes it.

Distributions by investment partnerships

The provision does not apply to a distribution of marketable securities by an investment partnership to an eligible partner.

Investment partnership.—An investment partnership is a partnership that (1) has never been engaged in a trade or business and (2) substantially all of whose assets consist of specified investment-type assets. A partnership is not treated as engaged in a trade or business by reason of any activity as an investor, trader or dealer in the specified investment-type assets. These activities are intended to include the receipt of any commitment fees, break-up fees, guarantee fees, director's fees or similar fees, that are customary in and incidental to an activity as such an investor, trader or dealer. In addition, regulatory authority is provided to specify other activities in which a partnership may engage without being treated as engaged in a trade or business. For example, it is anticipated that regulations will generally treat the following activities, for purposes of this provision, as not causing a partnership to be treated as engaged in a trade or business: (1) reasonable and customary management services provided to a lower-tier partnership; and (2) incidental services customarily provided in starting up a company in which the partnership holds a significant equity interest.

The specified investment-type assets are (1) money, (2) stock in a corporation, (3) notes, bonds, debentures, or other evidences of indebtedness, (4) interest rate, currency, or equity notional principal contracts, (5) foreign currencies, (6) interests in or derivative financial instruments (including options, forward or futures contracts, short positions, and similar financial instruments) in any other specified investment-type asset or in any commodity traded on a board of trade or commodity exchange, (7) other assets specified in regulations, or (8) any combination of the foregoing.

A look-through rule applies with respect to partnership interests. Except as otherwise provided in regulations, a partnership is treated as holding a proportionate share of the assets of any lower-tier partnership, and as engaging in any trade or business conducted by a lower-tier partnership, and a partner who contributes a partnership interest to another partnership is treated as contributing a proportionate share of the assets of the contributed partnership (and any lower-tier partnerships). Regulations may provide that this look-through rule does not apply (for example, in the case of a limited partnership interest held by a partnership, if the holding partnership does not engage in the management of the limited partnership). The bill provides that if, under regulations, the look-through rule does not apply to a partnership interest, then that partnership interest is treated as if it were a specified investment-type asset listed above (i.e., permitted to be held by an investment partnership).

Eligible partner.—An eligible partner is one that, before the date of the distribution, did not contribute to the partnership any property other than specified investment-type assets permitted to be held by an investment partnership. A partner is not treated as failing to be an eligible partner solely by virtue of having contributed services to the partnership. A partner who is not an eligible partner may not remove the taint from his partnership interest by transferring any portion of his interest to another person in a transaction in which gain or loss is not recognized in whole or in part.

Limitation on gain recognized

The bill permits a partner to receive a distribution of marketable securities without recognizing the gain that is attributable to his share of the partnership's net appreciation with respect to securities of the type distributed. For this purpose, a type of securities means a class of securities (for example, residual common stock) of a single issuer.

The bill provides that the amount of marketable securities treated as money is reduced by the excess of (1) the partner's distributive share of any net gain that he would take into account if all the securities (of the type distributed) held by the partnership immediately before the transaction were sold for their fair market value, over (2) the partner's distributive share of any net gain that he would take into account if all the securities (of that type) held by the partnership immediately after the transaction had been sold. In making this determination, the partner's share of net gain is determined immediately before and immediately after the transaction, using the same fair market value for the securities in each case. Thus, in the case of a transaction involving a series of distributions, the partner's share of net gain is unaffected by changes in the value of the distributed securities during the course of the distributions. In addition, the amount of gain allocated to a partner is determined with regard to any basis adjustment under section 743(b) with respect to that partner.

For example, assume that partnership ABC holds 300 shares of the common stock of X corporation, a marketable security, and other assets. A holds a ⅓ interest in the capital and profits of the partnership. Each share of stock held by the partnership has a basis of $10 and a value of $100. A's adjusted basis in its partnership interest is $5,000. Assume that the partnership distributes all the shares of X corporation to A in liquidation of his partnership interest. Under the general rule of new section 731(c), the $30,000 value of the X stock would be treated as money for purposes of determining A's gain. Under this gain limitation rule, however, the $30,000 amount is reduced by $9,000, the amount of gain that A would have taken into account if the partnership had sold all 300 shares of X stock for a total of $30,000. Thus, A recognizes a gain of $16,000 ($30,000 reduced by $9,000 (or $21,000), further reduced by A's $5,000 basis in his partnership interest).

The Treasury Secretary may issue regulations applying these rules by treating all marketable securities as being of the same type.

Other rules

Basis of securities distributed.—The bill provides that the adjusted basis of the distributed marketable securities is increased (over the basis as determined under present-law section 732) by the amount of gain recognized by reason of this provision. The amount of gain so recognized is allocated among the distributed marketable securities in proportion to the amounts of unrealized appreciation (determined before the increase in basis under the provision).

For example, assume that a partnership distributes to a partner, in a nonliquidating distribution, marketable security A with a value of $100 and a basis of $60, and marketable security B with a value of $100 and a basis of $40. The distributee partner's basis in his partnership interest is $120. Under present law, no gain is recognized, the partner's basis in security A is $60 and in security B is $40, and his adjusted basis in his partnership interest is $20. Assume that the partner will recognize gain of $40 under the provisions of the bill.[15] Under the bill, 40 percent of the gain (i.e., $16) is allocated to security A, and 60 percent of the gain (i.e., $24) is allocated to security B. Thus, the partner's basis in security A is $76 (i.e., $60 basis plus $16 gain allocated), and in security B is $64 (i.e., $40 basis plus $24 gain allocated). This result is the same whether security A and security B are securities of different issuers, of different classes of the same issuer, or blocks of securities of the same class and issuer but with different adjusted bases in the hands of the partnership.

Other basis rules

The adjusted basis of the partner's partnership interest and the partnership's adjusted basis in its remaining assets are determined without regard to this provision. The bill provides that rules for determining the distributee partner's basis in his partnership interest (sec. 733) are applied as if no gain were recognized, and no adjustment were made to the basis of property, under this provision. Thus, as under present law,[16] the distributee partner's basis in his partnership interest is reduced (in a nonliquidating distribution) by the basis of the distributed securities, as determined under section 732 and without regard to the provisions of the bill. Therefore, in the foregoing example, the distributee's basis in his partnership interest, initially $120, is reduced by the sum of the bases (in the hands of the partnership) of security A ($60) and security B ($40), for a total reduction of $100. After the distribution, his basis in his partnership interest is $20.

[15] The amount of gain recognized under the provision depends on the partner's share of partnership appreciation in securities of the same type (class and issuer) as securities A and B, as discussed above.

[16] The distribution of marketable securities continues, as under present law, to be treated as a distribution of property for purposes of determining basis.

The bill also provides that any increase or decrease (under sec. 734) in the basis of undistributed property of a partnership with a section 754 election in effect is made as if no gain were recognized, and no adjustment were made to the basis of property, under new section 731(c).

Coordination with section 737

The bill coordinates this provision with the provisions of present law relating to recognition of pre-contribution gain by a contributing partner (sec. 737). To the extent that the value of marketable securities distributed is treated as money for purposes of this provision, that amount is also treated as money for purposes of determining the amount of gain recognized under section 737. The amount treated as money may result in gain recognition under new section 721(c), and may therefore reduce the amount of gain otherwise recognized under section 737.

The basis adjustments resulting from gain recognized by reason of this provision are made in accordance with the rules of this provision, and not under the rules of section 737.

For example, in the case of a distribution of both marketable securities and other property to a partner who contributed appreciated property to the partnership, the partner may recognize gain under both new section 731(c) and section 737. The gain arising from the distribution of marketable securities increases the basis of the marketable securities in the hands of the distributee, while the section 737 gain arising from the distribution of the other property is allocated as under present law (i.e., to the partner's partnership interest (sec. 737(c)(1)), rather than to the marketable securities or directly to the other distributed property). As a result, the partner's basis in the distributed securities is determined without reference to the step-up in basis under section 737(c). These rules carry out the intent of the provision not to increase the basis of distributed marketable securities above their fair market value.

For example, assume that partner A contributed property with an adjusted basis of $100 and a value of $200 to partnership X. A's basis in its partnership interest is $100 (sec. 722). Within five years (assuming no other partnership activity), X distributes to A in a nonliquidating distribution a marketable security (which A did not contribute) with an adjusted basis of $100 and a value of $120, together with other property with an adjusted basis of $0 and a value of $20. A recognizes $40 of gain. Assuming that A's $20 of gain on the distribution of the marketable securities is reduced by $5 under the limitation on gain recognized rule of new section 731(c)(3)(B), A recognizes $15 of the gain by reason of new section 731(c) and $25 by reason of section 737. After the distribution, A's adjusted basis in the marketable security is $115, that is, $100 (as determined under sec. 732(a)(2)), increased by $15 (the gain recognized by reason of new section 731(c)). A's adjusted basis in its partnership interest is $25 ($100 reduced by $100 (the basis to the partner of the property distributed, computed without regard to section 731(c)), and increased by $25 (the gain recognized under section 737). A's basis in the other property is $0, as under present law (sec. 732(a)). The partnership's adjusted basis in the contributed property is increased by $25 (sec. 737(c)(2)).

Character of gain recognized

The bill provides that, to the extent the basis of any marketable security which is an unrealized receivable or an inventory item (as defined in secs. 751(c) and 751(d)(2)) is increased by reason of this provision, the gain recognized is ordinary income.[17]

Regulatory authority.—The bill provides that the Treasury Secretary shall promulgate regulations necessary or appropriate to carry out the purposes of this provision, including regulations to prevent the avoidance of the provision. It is intended that these regulations effectively prevent taxpayers from avoiding the intent of this provision, and, where appropriate, provide relief from the application of the provision.

It is intended that regulations address avoidance of the provision through, for example, arrangements involving changes in partnership allocations and distribution rights, multiple distributions, related entities, or otherwise. Thus, for example, regulations may provide that exceptions to the provision do not apply if the partnership allocations are changed to increase a partner's share of marketable securities shortly before a distribution, or to achieve the functional equivalent of a distribution (without an actual distribution) by allocating substantially all the items associated with the security to a particular partner or partners. As another example, regulations may address avoidance of this provision in the case in which a partnership distributes substantially all of its assets (other than marketable securities and money) to some partners, with the practical effect of a distribution of the marketable securities to the other partners. As a further example, regulations may address avoidance of the provision through distributions of property in connection with a pre-arranged purchase of the distributed property, or through transactions involving a distribution of property together with the right to dispose of such property at substantially above its fair market value.

Effective date

The provision generally applies to partnership distributions after the date of enactment, except that the provision does not apply to any marketable security distributed before January 1, 1995 by the partnership that held the security on July 27, 1994. It is intended that this exception for securities held on July 27, 1994 apply to marketable securities acquired by the partnership after that date and distributed before January 1, 1995, if the basis of such securities is determined by reference to the securities held by the partnership on July 27, 1994 (e.g., securities received in a stock split or reorganization). If a partner receives a distribution of marketable securities otherwise eligible for this exception for securities held on July 27, 1994, and such securities are re-contributed to the partnership so that the exception for securities contributed by the distributee partner (described above) arguably might later apply, then this exception (for securities held on July 27, 1994) is intended not to apply.

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[17] Section 751(b) is intended to apply prior to the application of new section 731(c) (see sec. 731(d), as redesignated by the bill).

A transition rule provides that the provision does not apply to a partnership distribution of marketable securities in liquidation of a partner's interest pursuant to a written contract, binding on July 15, 1994 and at all times thereafter before the distribution, to purchase the partner's interest by a date certain for a fixed value of marketable securities that are specified in the contract or for other property; provided that the transition rule does not apply if the partner has the right unilaterally to elect that the distribution be made other than in marketable securities. A fixed value of marketable securities is intended to mean a value fixed in dollars or another currency. This transition rule does not affect whether sections 737 or 707 apply.

The provision does not apply to a distribution of marketable securities by any publicly traded partnership (defined in sec. 7704(b)) that as of December 31, 1987 met the definition of an existing partnership (under sec. 10211(c)(2) of the Revenue Act of 1987, i.e., the effective date rules of sec. 7704), provided certain requirements are met. The requirements are met if the distribution occurs in a qualified partnership liquidation and if (1) the marketable securities were received by the partnership in a nonrecognition transaction in exchange for substantially all of the assets of the partnership, (2) the marketable securities are distributed by the partnership within 90 days after their receipt by the partnership, and (3) the partnership is liquidated before the beginning of the first taxable year of the partnership beginning after December 31, 1997. A qualified partnership liquidation for this purpose is a complete liquidation of a publicly traded partnership described above, or a complete liquidation of a partnership that is related to such a publicly traded partnership if its liquidation is related to the complete liquidation of such publicly traded partnership.

2. *Taxpayer identification numbers required at birth (sec. 742 of the bill and secs. 32 and 6109 of the Code)*

Present law

A taxpayer claiming an exemption for a dependent is required to provide a taxpayer identification number (TIN) on the tax return for any dependent who has attained the age of 1 as of the close of that taxable year (sec. 6109(e)). A parallel requirement applies to taxpayers with qualifying children claiming the earned income tax credit (EITC) (sec. 32(c)(3)(D)). An individual's TIN is, in general, that individual's social security number.

Reasons for change

The requirement that TINs be provided with respect to each dependent claimed on a tax return has significantly reduced the improper claiming of dependents. Requiring that TINs be supplied regardless of the age of the dependent will further reduce the improper claiming of dependents.

Explanation of provision

Taxpayers claiming dependents must provide a TIN for each dependent, regardless of the dependent's age. A parallel requirement applies to taxpayers with qualifying children claiming the EITC.

Some taxpayers may encounter legitimate difficulties in obtaining a TIN within the timeframe necessary for filing a tax return (such as, for example, where a child is being adopted). It is anticipated that the IRS will provide reasonable administrative accommodation in these legitimate situations.

Effective date

For returns filed with respect to tax year 1995, taxpayers must provide TINs for all dependents and qualifying children for EITC purposes who were born on or before October 31, 1995. For returns filed with respect to tax year 1996, taxpayers must provide TINs for all dependents and qualifying children born on or before November 30, 1996. For returns filed with respect to tax year 1997, and all subsequent years, taxpayers must provide TINs for all dependents and qualifying children, regardless of their age.

3. Extension of Internal Revenue Service user fees (sec. 743 of the bill and sec. 10511 of the Revenue Act of 1987)

Present law

The Internal Revenue Service (IRS) provides written responses to questions of individuals, corporations, and organizations relating to their tax status or the effects of particular transactions for tax purposes. The IRS responds to these inquiries through the issuance of letter rulings, determination letters, and opinion letters. The IRS generally charges a fee for requests for a letter ruling, determination letter, opinion letter, or other similar ruling or determination. The legislation that requires the establishment of this fee program provides that it is not to apply to requests made after September 30, 1995.

Reasons for change

The IRS user fee program provides an appropriate mechanism whereby those directly benefitting from government services pay a fee that partially offsets the costs of providing those services. Consequently, the program should be extended.

Explanation of provision

The IRS user fee program is extended for five years.

Effective date

The provision applies to requests made after September 30, 1995, and before October 1, 2000.

4. Modification of substantial understatement penalty for corporations participating in tax shelters (sec. 744 of the bill and sec. 6662 of the Code)

Present law

Under present law, a 20-percent penalty applies to any portion of an underpayment of income tax required to be shown on a return that is attributable to a substantial understatement of income tax. For this purpose, an understatement is considered "substantial" if it exceeds the greater of (1) 10 percent of the tax required to be shown on the return, and (2) $5,000 ($10,000 in the case of a corporation other than an S corporation or a personal holding company). Generally, the amount of an "understatement" of income tax is the excess of the tax required to be shown on the return, over the tax shown on the return (reduced by any rebates of tax). The substantial understatement penalty does not apply if there was a reasonable cause for the understatement and the taxpayer acted in good faith with respect to the understatement (the "reasonable cause exception"). The determination as to whether the taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances.

In determining whether an understatement is substantial, the understatement generally is reduced by the portion of the understatement that is attributable to an item for which there was substantial authority or adequate disclosure. In the case of tax shelter items, however, the understatement is reduced only by the portion of the understatement that is attributable to an item for which there both was substantial authority and with respect to which the taxpayer reasonably believed that the claimed treatment of the item was more likely than not the proper treatment. Disclosure made with respect to a tax shelter item does not affect the amount of an understatement.

A tax shelter is any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement if the principal purpose of such partnership, entity, plan or arrangement is to avoid or evade Federal income tax. An item of income, gain, loss, deduction or credit is a tax shelter item if the item is directly or indirectly attributable to the principal purpose of the tax shelter.

Reasons for change

While tax shelters for individuals have been significantly curtailed recently through legislation (such as, for example, the passive activity loss rules), there appear to be a growing number of aggressive tax shelter transactions involving corporate taxpayers. The substantial understatement penalty may not effectively deter these abusive corporate tax shelter transactions. Accordingly, the standards applicable to corporate tax shelters are tightened.

Explanation of provision

With respect to corporate taxpayers, the bill eliminates the exception to the substantial understatement penalty regarding tax shelter items for which the taxpayer had substantial authority and reasonably believed that its treatment was more likely than not the proper treatment. Thus, if a corporate taxpayer has a substantial understatement that is attributable to a tax shelter item, the substantial understatement penalty applies with respect to the understatement, unless the "reasonable cause exception" applies.

A determination by a taxpayer or a professional tax advisor that the substantial authority and more likely than not standards are satisfied will be an important factor in assessing whether the "reasonable cause exception" applies, but it will not be enough, by itself, to establish that the "reasonable cause exception" does in fact apply. For example, reliance on the opinion of a professional tax advisor may be unreasonable where the advisor makes inappropriate legal or factual assumptions, does not address all relevant issues, or inappropriately relies on representations or agreements to take certain actions made by the taxpayer or other parties.

It is the intent of the provision that the standards applicable to corporate shelters be tightened; consequently, in no instance would this modification result in a penalty not being imposed where a penalty would have been imposed under prior law.

Effective date

The provision applies to transactions occurring after the date of enactment.

5. Modification of authority to set terms and conditions for savings bonds (sec. 745 of the bill and sec. 3105 of the United States Code)

Present law

The Department of Treasury has the authority to issue savings bonds and to design the key features of those bonds, including their investment yield. The Treasury also has the authority to change the investment yield for outstanding bonds, although never below the minimum investment yield guaranteed at issuance through the original maturity date. For Series E bonds, the investment yield must be at least four percent per year compounded semiannually. (Series EE bonds are the only Series E bonds currently issued.)

Series EE savings bonds are noncallable, nontransferable, registered securities redeemable anytime after six months from the date of issue. Prior to March 1993, Treasury regulations provided for investment yields that exceeded four percent per year and increased with holding periods of between six months and five years. Currently, bonds held less than five years pay the statutory minimum investment yield of four percent per year. Bonds held five years or longer pay a market-based investment yield of 85 percent of an average of applicable yields for the holding period on outstanding Treasury securities with approximately five years remaining to maturity or four percent, whichever is greater.

Reasons for change

It is desirable that the Department of the Treasury have greater flexibility in structuring savings bonds than present law allows. The statutory minimum investment yield of four percent is an unnecessary constraint. It also can make these bonds a more expensive source of federal borrowing during periods when interest rates are lower than four percent. At such times, the statutory minimum can encourage investors to use Series EE bonds as higher-than-market alternatives to other short-term financial instruments, such as money market funds. This is contrary to a goal of the savings bond program, which is intended to encourage long-term savings. Repeal of the statutory minimum investment yield would allow for low-cost Treasury borrowing and would better further the goals of the savings bond program.

Explanation of provision

The bill repeals the present-law requirement that United States Series E savings bonds pay investment yields of at least four percent per year, compounded semiannually.

Effective date

The provision is effective for bonds issued on or after October 31, 1994.

SUBTITLE F.—PENSION PLAN FUNDING AND PREMIUMS

I. Overview of present law

Defined benefit pension plans.—A defined benefit pension plan is a type of employer-sponsored retirement plan that provides benefits to participants based upon a formula specified in the plan. For example, a defined benefit pension plan could provide a benefit equal to a percentage of an employee's average compensation multiplied by the number of years of service with the employer. A defined benefit pension plan could also provide a flat dollar benefit based on years of service, or a specified percentage of final or average compensation. The key feature of such a plan is that the benefit promised is based on the plan formula, not on the assets or investment experience of the plan.

In order to help ensure that the promised benefits are paid to plan participants, defined benefit pension plans are subject to minimum funding requirements under both the Internal Revenue Code (the Code) and title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), which require the employer sponsoring the plan to make certain contributions to fund the plan. These requirements are discussed in detail below.

Pension Benefit Guaranty Corporation.—As enacted in ERISA, as well as under present law, the minimum funding requirements permit an employer to fund defined benefit pension plan benefits over a period of time. Thus, it is possible that a plan may be terminated at a time when plan assets are not sufficient to provide all benefits earned by employees under the plan. In order to protect plan participants from losing retirement benefits in such circumstances, the Pension Benefit Guaranty Corporation (PBGC), a corporation within the Department of Labor, was created in 1974 by ERISA to provide an insurance program for benefits under most defined benefit pension plans maintained by private employers. According to the PBGC's annual report for fiscal year 1993, the single-employer insurance program covers more than 32 million participants in about 64,000 defined benefit pension plans.

Termination of underfunded pension plans.—Prior to 1986, an employer generally could, subject to contractual obligations, terminate a single-employer defined benefit pension plan at any time without regard to the financial health of the employer and without regard to the level of assets in the plan. If a single-employer defined benefit pension plan was terminated with assets insufficient to pay benefits at the level guaranteed by the PBGC, the employer was liable to the PBGC for the lesser of the insufficiency or an amount equal to 30 percent of the employer's net worth.

Under these rules, employers that wanted to rid themselves of unfunded liabilities could simply terminate the plan, and the PBGC would be liable for benefits. The PBGC was in some cases prevented from recouping its liability from the employer, even if the employer was financially sound. The plan termination rules were amended to prevent such transferring of liabilities to the PBGC by the Single-Employer Pension Plan Amendments Act of 1986 (SEPPAA) and were modified further by the Pension Protection Act of 1987.

Under present law, a defined benefit pension plan with assets insufficient to provide for benefit liabilities can be terminated voluntarily by the employer only if the employer and members of the controlled group of the employer are in financial distress (a distress termination). In general, benefit liabilities include all fixed and contingent liabilities to plan participants and beneficiaries.

Following a distress termination, the PBGC pays out all benefits under the plan, including guaranteed benefits and those not guaranteed. The amount of benefits in excess of guaranteed benefits that are paid to plan participants depends on the level of plan funding and the amount the PBGC is able to recover from the employer. The employer is liable to the PBGC for the full amount of unfunded benefit liabilities.

Guaranteed benefits.—The PBGC guarantees vested retirement benefits (other than those that vest solely on account of the plan termination), up to a maximum benefit of $2,556.82 per month for plans terminating in 1994. The dollar limit is indexed annually for inflation. The guarantee is reduced for benefits starting before age 65, and does not apply to certain types of ancillary benefits. In the case of a plan or a plan amendment that has been in effect for less than 5 years before a plan termination, the amount guaranteed is generally phased in by 20 percent a year.

Sources of PBGC funding.—The PBGC is funded by assets in terminated plans, amounts recovered from employers who terminate underfunded plans, premiums paid with respect to covered plans, and investment earnings. All covered plans are required to pay a flat per-participant premium and underfunded plans are subject to an additional variable premium based on the level of underfunding.

As initially enacted in ERISA, covered plans were required to pay an annual flat premium to the PBGC of $1.00 per plan participant. The flat-rate per-participant premium has been increased several times since the enactment of ERISA, and is currently $19 per participant in 1994.

The variable rate premium was enacted by the Pension Protection Act of 1987. It was believed that underfunded plans should bear a greater share of the premium than well-funded plans because they pose a greater risk of exposure to the PBGC. The amount of the variable rate premium is $9.00 per each $1,000 of unfunded vested benefits, up to a maximum of $53 per participant. Thus, the maximum total per-participant premium for an underfunded plan is $72 per year.

II. Reasons for change

Financial status of the PBGC.—As of September 30, 1993, the PBGC reported a deficit of $2.9 billion in the single-employer insurance program. This is an increase over the $2.7 billion deficit reported as of the end of the prior fiscal year. The PBGC also estimated in its 1993 annual report that approximately $53 billion in unfunded liabilities existed in single-employer defined benefit pension plans in 1992. Approximately 72 percent of this underfunding, or approximately $38 billion, is concentrated in single-employer plans sponsored by just 50 companies, primarily in the steel, automobile, tire, and airline industries.

The PBGC has estimated its future financial status under a variety of assumptions. The single-employer program deficit could range from $1.9 billion by the end of 2003 if losses are relatively low, to $13.8 billion by the end of 2003 if losses are high.

In a study released by the U.S. General Accounting Office (GAO) in December 1992,[18] GAO reported that the 44 plans with the largest claims against the PBGC for calendar years 1986–88 had aggregate unfunded liabilities at termination of $2.7 billion. These unfunded liabilities were $990 million, or 58 percent, higher than the $1.7 billion in unfunded liabilities reported by the 44 plans on their last, pretermination annual filing with the Internal Revenue Service (IRS). GAO termed this additional unfunded liability a "hidden liability" to the PBGC because it was not reported by plans before termination.

Hidden liabilities can result from several causes. Most of the $990 million in hidden liability reported in the GAO study was due to PBGC's higher estimate of plan liabilities as a result of PBGC's use of actuarial assumptions that were different than the assumptions used by plan sponsors. Hidden liabilities also can result because of the payment of shutdown [19] or special early retirement benefits, earlier-than-anticipated retirements, and PBGC's receipt of fewer assets than reported by the plans.

Reasons for PBGC's financial status.—The chronic underfunding of some defined benefit pension plans poses a significant risk to the PBGC. The PBGC's single-employer insurance program has a $2.9 billion deficit. Furthermore, the overall level of underfunding is rapidly increasing among single employer plans and now exceeds $50 billion. Of this amount, reasonably possible future claims against the PBGC exceed $13 billion. These claims, and the continued underfunding of pension benefits threaten the future solvency of the PBGC and may lead to a taxpayer bailout if the Federal Government is required to pay pension benefits to participants of underfunded pension plans which terminate.

There is concern that the sponsors of underfunded defined benefit pension plans continue to promise additional pension benefits without funding the plans' existing unfunded pension liabilities. Under present law, new pension liabilities can be added to an underfunded defined benefit pension plan before old liabilities are funded. Companies in financial difficulty sometimes use benefit increases as a means to increase compensation when they cannot afford to pay higher current wages. Workers may be willing to accept

[18] U.S. General Accounting Office, "Hidden Liabilities Increase Claims Against Government Insurance Program" (GAO/HRD–93–7), December 30, 1992.

[19] Shutdown benefits are benefits payable only upon the closing of a facility or termination of the plan sponsor's business operations. Since plan actuaries cannot predict the probability of such occurrences, shutdown benefits are only partially funded, at best.

such unfunded future pension promises because they are at least partially insured by the PBGC and workers recognize that the immediate costs to their employers of higher wages makes such wage increases unlikely.

Under present law, sponsors of underfunded defined benefit pension plans are not required to fund their plans within a reasonable time. Under present law, plan sponsors are allowed to fund their pension liabilities over an extended period of time. Some companies have taken advantage of the flexibility under the present-law rules and have chosen to maintain their plans at significantly underfunded levels. Some companies have used this funding flexibility to maintain chronically underfunded plans whose financial condition has not improved since the passage of ERISA nearly 20 years ago. In a few cases, companies have terminated plans with no remaining assets without ever violating present-law minimum funding standards.

The PBGC lacks sufficient information from defined benefit pension plan sponsors with which to determine the risks it bears as the result of underfunded defined benefit pension plans. Under present law, the PBGC can subpoena information from plans and plan sponsors for the purpose of carrying out its responsibilities under ERISA. However, this subpoena process is rarely used because it is costly, labor intensive and time consuming. As a result, the PBGC has used this authority only in cases involving negotiations with financially troubled plan sponsors. The PBGC has not used its subpoena authority for purposes of day-to-day policy or operational reviews of ongoing plans.

As reported by the GAO, following plan termination, plan underfunding typically is nearly 60 percent greater than previously reported by the plan sponsor on its latest Form 5500 filed with the IRS. In addition, the level of underfunding tends to rise rapidly shortly before termination of a defined benefit pension plan. In these situations, the PBGC is unable to take prompt action to protect the Government and plan participants from further loss because it lacks necessary financial information. Thus, the PBGC needs full and timely access to the records of the defined benefit pension plans that it insures, in much the same manner as the Federal Deposit Insurance Corporation (FDIC) has access to information on the financial institutions it insures.

The PBGC's deficit has increased, in part, because premiums paid to the PBGC are not sufficient to cover its operations. The PBGC's premium income continues to be insufficient to cover the costs of actual and expected plan terminations for which the PBGC is responsible. Further, the PBGC's variable rate premium does not properly reflect the risk assumed by the PBGC in providing insurance for severely underfunded defined benefit pension plans.

Under present law, plan participants are not fully aware of the extent to which their defined benefit pension plans are underfunded and that not all benefits are fully insured by the PBGC. There are certain disclosure requirements applicable to defined benefit pension plan sponsors which allow participants to monitor and understand benefits under their plan. Plans are required to provide participants with a summary plan description, which typically provides a boilerplate summary of pension benefit guarantees and a summary annual report, which should indicate whether minimum funding standards have been met and the extent of underfunding if a plan is less than 70 percent funded. Despite these varied reporting requirements, participants are not given clear and understandable information about (1) the extent to which their plan is underfunded and (2) which of their benefits are insured by the PBGC, and the extent to which such benefits are insured, should their underfunded plan terminate.

Results of bill.—The bill is designed to improve the funding of single-employer defined benefit pension plans and reduce the potential exposure of the PBGC. The bill also is intended to reduce or eliminate the PBGC's operating deficit and to reduce the defined benefit pension system's unfunded liabilities for which the Federal Government is potentially responsible.

Under the bill, pension plan sponsors will be required to meet their existing pension commitments in a reasonable period of time. The funding requirements will ensure that sponsors of underfunded defined benefit pension plans contribute amounts sufficient to improve the financial condition of the plans or, at a minimum, prevent plan funding from deteriorating. Further, the bill will allow employers that sponsor both underfunded defined benefit pension plans and defined contribution plans to fully fund their underfunded defined benefit plans more rapidly.

It is important to require that plan sponsors provide participants in defined benefit pension plans that are underfunded with a simple notice each year stating the extent to which the plan is underfunded, and an explanation of which benefits will or will not be guaranteed by the PBGC and the extent of the PBGC's guarantee, if the plan is terminated.

The bill provides the PBGC with better access to the records of certain troubled plans that it insures. This will allow the PBGC to take prompt action to protect participants, the PBGC, and taxpayers from any additional losses.

The bill's provision phasing out of the present-law cap on the additional premium for underfunded plans contained in the bill will require poorly funded plans, which pose the greatest risk to the PBGC, to pay their fair share of premiums. The phase out also will encourage underfunded plans to contribute more or otherwise reduce underfunding in order to avoid the payment of additional premiums.

III. Retirement Protection Act of 1994

A. PART I—PENSION PLAN FUNDING

1. *Minimum funding requirements (secs. 751 and 761 of the bill, secs., 412(c), (l), and (m) of the Code, and secs., 204, 302 (d), and (e) of ERISA)*

Present law

In general.—ERISA and the Code impose both minimum and maximum defined benefit pension plan funding requirements. The minimum funding requirements are designed to provide at least a certain level of benefit security by requiring the employer to make certain minimum contributions to the plan. The requirements recognize that, in an on-going plan, pension liabilities are generally a long-term liability. Thus, benefits are not required to be immediately funded, but can be funded over a long period of time.

The maximum funding limitations are designed to limit and allocate efficiently the loss of Federal tax revenue associated with the special tax treatment afforded qualified retirement plans. Thus, annual deductible contributions to a defined benefit pension plan are limited to an amount that is not significantly greater than the amount that would normally be necessary under the employer's long-term actuarial funding method.

The minimum and maximum funding requirements provide the employer considerable flexibility in determining the amount of the contribution that must, or can, be made in any given year. The minimum required or maximum permitted contribution that can be made depends on the funding method used by the plan and the actuarial assumptions used by the plan actuary.

In response to concerns about the financial status of underfunded pension plans, the minimum funding standards were modified, and special additional funding requirements were added for certain underfunded pension plans, by the Pension Protection Act of 1987.

The minimum and maximum funding requirements, and the special rules for underfunded pension plans, are discussed in detail below.

Minimum funding standard

In general.—Under the Code and ERISA, certain defined benefit pension plans are required to meet a minimum funding standard for each plan year. As an administrative aid in the application of the funding standard, each defined benefit pension plan is required to maintain a special account called a "funding standard account" to which specified charges and credits (including credits for contributions to the plan) are to be made for each plan year. If, as of the close of a plan year, the account reflects credits equal to or in excess of charges, the plan is treated as meeting the minimum funding standard for the year. Thus, as a general rule, the minimum contribution for a plan year is determined as the amount by which the charges to the account would exceed credits to the account if no contribution where made to the plan.

Accumulated funding deficiencies

If, as of the close of any plan year, charges to the funding standard account exceed credits to the account, then the excess is referred to as an "accumulated funding deficiency." Unless a minimum funding waiver is obtained, an employer who is responsible for contributing to a plan with an accumulated funding deficiency is subject to a 10-percent nondeductible excise tax on the amount of the deficiency (Code sec. 4971). If the deficiency is not corrected within the "taxable period", then an employer who is responsible for contributing to the plan is also subject to a nondeductible excise tax equal to 100 percent of the deficiency. The taxable period is the period beginning with the end of the plan year in which there is a deficiency and ending on the earlier of (1) the date of a mailing of a notice of deficiency with respect to the 10-percent tax or (2) the date on which the 10-percent tax is assessed by the Internal

Revenue Service (IRS). If the employer responsible for contributing to the plan is a member of a controlled group, each member of the group is jointly and severally liable for the excise tax.

For example, if the balance of charges to the funding standard account of a plan for a year would be $200,000 without any contributions, then a minimum contribution in that amount would be required to meet the minimum funding standard for the year to prevent an accumulated funding deficiency. If the total contribution is not made, then the employer would be subject to an excise tax equal to 10-percent of the deficiency for the year. If the deficiency were not corrected within the specified period, then the 100-percent excise tax would be imposed on such employer.

Funding methods

In general.—A defined benefit pension plan is required to use an acceptable actuarial cost method to determine the elements included in its funding standard account for a year. Generally, an actuarial cost method breaks up the cost of benefits under the plan into annual charges consisting of two elements for each plan year. These elements are referred to as (1) normal cost, and (2) supplemental cost.

Normal cost.—The normal cost for a plan for a year generally represents the cost of future benefits allocated to the year by the funding method used by the plan for current employees and, under some funding methods, for separated employees. Specifically, it is the amount actuarially determined that would be required as a contribution by the employer to maintain the plan if the plan had been in effect from the beginning of service of the included employees and if the costs for prior years had been paid, and all assumptions as to interest, mortality, time of payment, etc., had been fulfilled. The normal cost will be funded by future contributions to the plan (1) in level dollar amounts, (2) as a uniform percentage of payroll, (3) as a uniform amount per unit of service (e.g., $1 per hour), or (4) on the basis of the actuarial present values of benefits considered accruing in particular plan years.

Supplemental cost.—The supplemental cost for a plan year is the cost of future benefits allocated to the year that would not be met by normal costs and employee contributions. The most common supplemental cost is that attributable to past service liability, which represents the cost of future benefits under the plan (1) on the date of the plan is first effective, or (2) on the date a plan amendment increasing plan benefits is first effective. Under some funding methods, there is no past service liability component.

Other supplemental costs may be attributable to net experience losses, changes in actuarial assumptions, and amounts necessary to make up funding deficiencies for which a waiver was obtained. Supplemental costs must be amortized over a range of years specified under the Code and ERISA.

Acceptable methods.—Normal cost and supplemental cost are key elements in computations under the minimum funding standard. Although these costs may differ substantially, depending upon the actuarial cost method used to value a plan's assets and liabilities, they must be determined under an actuarial cost method permitted by ERISA. ERISA enumerates six acceptable actuarial cost methods and provides that additional methods may be permitted under Treasury regulations. Normal costs and supplemental costs under a plan are computed on the basis of an actuarial valuation of the assets and liabilities of a plan. An actuarial valuation is required once every plan year. More frequent valuations may be required by the IRS.

Charges and credits to the funding standard account

In general.—Under the minimum funding standard, the portion of the cost of a plan that is required to be paid for a particular year depends upon the nature of the cost. For example, the normal cost for a year is generally required to be funded currently. On the other hand, costs with respect to past service (for example, the cost of retroactive benefit increases), experience losses, and changes in actuarial assumptions, are spread over a period of years.

Normal cost.—Each plan year, a plan's funding standard account is charged with the normal cost assigned to that year under the particular acceptable actuarial cost method adopted by the plan. The charge for normal cost will require an offsetting credit in the funding standard account. Usually, an employer contribution is required to create the credit.

For example, if the normal cost for a plan year is $150,000, the funding standard account would be charged with that amount for the year. Assuming that there are no other credits in the account to offset the charge for normal cost, an employer contribution of $150,000 will be required for the year to avoid an accumulated funding deficiency.

Past service liability.—There are 3 separate charges to the funding standard account that may arise as the result of past service liabilities. The first applies to a plan under which past service liability has increased due to a plan amendment made after January 1, 1974; the second applies only to a plan that came into existence after January 1, 1974; and the third applies only to a plan in existence on January 1, 1974. Past service liabilities result in annual charges to the funding standard account for a specified period of years. Assuming that there are no other credits in the account to offset a charge for past service liability, an employer contribution will be required for the year to avoid an accumulated funding deficiency.

In the case of a plan that was in existence on January 1, 1974, the funding standard account is charged annually with a portion of the past service liability determined as of the first day of the plan year of which the funding standard applied to the plan (generally the plan year beginning in 1976). In the case of a single-employer plan, the amount of the liability with which the account is charged for a year is based on amortization of the past service liability over a period of 40 plan years. The liability is required to be amortized (in much the same manner as a 40-year mortgage) in equal annual installments over the 40-year funding period unless the plan becomes fully funded.

A plan that was not in existence on January 1, 1974, is generally required to determine past service liability as of the first day of its first plan year beginning after September 2, 1974 (the date ERISA was enacted). This liability is required to be amortized by a single-employer plan in equal annual installments over a period of 30 plan years. Accordingly, if there are no other credits in the account to offset the charge for this past service liability, and if the plan does not become fully funded, annual employer contributions will be required for 30 plan years to offset charges for this past service liability.

With respect to all plans (whether or not in existence on January 1, 1974), if a net benefit increase takes place as the result of a plan amendment, then the unfunded past service liability attributable to the net increase is determined that year and amortized over a period of 30 years.

For example, assume that a plan uses the calendar year as the plan year. Further assume that during 1987 the plan is amended to increase benefits and that the net result of a plan amendments for 1987 is that the past service liability under the plan is increased by $500,000. In addition, the plan's actuary uses an interest rate of 8 percent in determining plan costs. The 30-year schedule requires that $44,414 be charged to the funding standard account each year to amortize the past service liability.

Accordingly, for each year in the 30-year period beginning with 1987, the plan's funding standard account is charged with the amount of $44,414. If there are no other credits in the account to offset the charge for past service liability, an employer contribution of $44,414 would be required for each of the 30 years to avoid an accumulated funding deficiency unless the plan becomes fully funded.

Gains and losses from changes in assumptions.—If the actuarial assumptions used for funding a plan are revised and, under the new assumptions, the accrued liability of a plan is less than the accrued liability computed under the previous assumptions, the decrease is a gain from changes in actuarial assumptions. If the new assumptions result in an increase in the accrued liability, the plan has a loss from changes in actuarial assumptions. The accrued liability of a plan is the actuarial present value of projected pension benefits under the plan that will not be funded by future contributions to meet normal cost. Under the funding standard, the gain or loss of a year from changes in actuarial assumptions is amortized over a period of 10 plan years, resulting in credits or charges to the funding standard account.

Experience gains and losses—In determining plan funding under an actuarial cost method, a plan's actuary generally makes certain assumptions regarding the future experience of a plan. These assumptions typically involve rates of interest, mortality, disability, salary increases and other factors affecting the value of assets and liabilities. If, on the basis of these assumptions, the contributions made to the plan result in actual unfunded liabilities that are less than anticipated by the actuary, then the excess is an experience gain. If the actual unfunded liabilities are greater than those anticipated, then the difference is an experience loss. For a single-employer plan, experience gains and losses for a year are amortized over a 5-year period.

Waived funding deficiencies.—Under the funding standard, the amount of a waived funding deficiency is amortized over a period of 5 plan years, beginning with the year following the year in which the waiver is granted. Each year, the funding standard account is charged with the amount amortized for that year unless the plan becomes fully funded. The interest rate used for purposes of determining the amortization on the waived amount is the greater of (1) the rate used in computing costs under the plan, or (2) 150 percent of the mid-term applicable Federal interest rate (AFR) in effect for the first month of the plan year.

Switchback liability.—ERISA provides that certain plans may elect to use an alternative minimum funding standard account for any year in lieu of the funding standard account. ERISA prescribes specified annual charges and credits to the alternative account. No accumulated funding deficiency is considered to exist for the year if a contribution meeting the requirements of the alternative account is made, even if a smaller contribution is required to balance charges and credits in the alternative account than would be required to balance the funding standard account for a plan year.

During years for which contributions are made under the alternative account, an employer must also maintain a record of the charges and credits to the funding standard account. If the plan later switches back from the alternative account to the funding standard account, the excess, if any, of charges over credits at the time of the change ("the switchback liability") must be amortized over a period of 5 plan years.

Reasonableness of actuarial assumptions

All costs, liabilities, interest rates, and other factors are required to be determined on the basis of actuarial assumptions and methods (1) each of which is reasonable individually or (2) which result, in the aggregate, in a total plan contribution equivalent to a contribution that would be obtained if each assumption were reasonable. In addition, the assumptions are required to reflect the actuary's best estimate of experience under the plan.

Special rules for underfunded plans

In general.—A special funding rule applies to underfunded single-employer defined benefit pension plans (other than plans with no more than 100 participants on any day in the preceding plan year). This special funding rule was adopted in the Pension Protection Act of 1987 due to concerns about the solvency of the defined benefit pension plan system and because of concerns that the generally applicable funding rules were not in all cases sufficient to ensure that plans would be adequately funded.

Calculation of minimum required contribution.—With respect to plans subject to the special rule, the minimum required contribution is, in general, the greater of (1) the amount determined under the normal funding rules, or (2) the sum of (a) normal cost, (b) the amount necessary to amortize experience gains and losses over 5 years and gains and losses resulting from changes in actuarial assumptions over 10 years, and (c) the deficit reduction contribution plus the amount required with respect to benefits that are contingent on unpredictable events. In no event is the amount of the contribution to exceed the amount necessary to increase the funded ratio of the plan to 100 percent.

The deficit reduction contribution is the sum of (1) the unfunded old liability amount, and (2) the unfunded new liability amount. Calculation of these amounts is based on the plan's current liability.

Current liability.—The term "current liability" generally means all liabilities to employees and their beneficiaries under the plan determined as if the plan terminated. However, the value of any "unpredictable contingent event benefit" is not taken into account in determining current liability until the event on which the benefit is contingent occurs.

The interest rate used in determining the current liability of a plan, as well as the contribution required under the special rule, is required to be within a specified range. The permissible range is defined as a rate of interest that is not more than 10 percent above or below the weighted average of the rates of interest of 30-year Treasury securities for the 4-year period ending of the last day before the beginning of the plan year for which the interest rate is being used. The weights are established in IRS Notice 88-37. The annual rate of interest on 30-year Treasury securities is the rate published by the Board of Governors of the Federal Reserve System. The Secretary may, where appropriate, allow a lower rate of interest except that such rate may not be less than 80 percent of the average rate discussed above.

Unfunded current liability means, with respect to any plan year, the excess of (1) the plan's current liability over (2) the value of the plan's assets reduced by any credit balance in the funding standard account. The funded current liability percentage of a plan for a plan year is the percentage that (1) the value of the plan's assets (reduced by any credit balance in the funding standard account) is of (2) the plan's current liability.

Unfunded old liability amount.—The unfunded old liability amount is, in general, the amount necessary to amortize the unfunded old liability under the plan in equal annual installments (until full amortized) over a fixed period of 18 plan years (beginning with the first plan year beginning after December 31, 1998). The "unfunded old liability" with respect to a plan is the unfunded current liability of the plan as of the beginning of the first plan year beginning after December 31, 1987, determined without regard to any plan amendment adopted after October 16, 1987, that increases plan liabilities (other than amendments adopted pursuant to certain collective bargaining agreements).

Unfunded new liability amount.—The unfunded new liability amount for a plan year is the applicable percentage of the plan's "unfunded new liability." Unfunded new liability means the unfunded current liability of the plan for the plan year, determined without regard to (1) the unamortized portion of the unfunded old liability (and the unamortized portion of the unfunded liability from certain benefit increases) and (2) the liability with respect to any unpredictable contingent event benefits, without regard to whether or not the event has occurred. Thus, in calculating the unfunded new liability, all unpredictable contingent event benefits are disregarded, even if the event on which that benefit is contingent has occurred.

If the funded current liability percentage is less than 35 percent, then the applicable percentage is 30 percent. The applicable percentage decreases by .25 of one percentage point for each 1 percentage point by which the plan's funded current liability percentage exceeds 35 percent. For example, if a plan's funded current liability percentage is 39 percent, 29 percent of the plan's unfunded new liability for the plan year must be included in the calculation of the deficit reduction contribution for the plan year.

Unpredictable contingent event benefits.—The value of any unpredictable contingent event benefit is not considered until the event has occurred. If the event on which an unpredictable contingent event benefit is contingent occurs during the plan year and the assets of the plan are less than current liability (calculated after the event has occurred), then an additional funding contribution (over and above the minimum funding contribution otherwise due) is required.

Unpredictable contingent event benefits include benefits that depend on contingencies that, like facility shutdowns or reductions or contractions in workforce, are not reliably and reasonably predictable. The event on which an unpredictable contingent event benefit is contingent is generally not considered to have occurred until all events on which the benefit is contingent have occurred.

The amount of the additional contribution is generally equal to the greater of (1) the unfunded portion of the benefits paid during the plan year (regardless of the form in which paid), including (except as provided by the Secretary) any payment for the purchase of an annuity contract with respect to a participant with respect to unpredictable contingent event benefits, and (2) the amount that would be determined for the year if the unpredictable contingent event benefit liabilities were amortized in equal annual installments over 7 years, beginning with the plan year in which the event occurs.

The rules relating to unpredictable contingent event benefits is phased in for plan years beginning in 1989 through 2001.

Small plan rule

The special rules for underfunded plans do not apply to plans with 100 or fewer employees. In the case of a plan with more than 100 but no more than 150 participants during the preceding year, the amount of the additional deficit reduction and unpredictable contingent amount benefit contribution is determined by multiplying the otherwise required additional contribution by 2 percent for each participant in excess of 100.

Full funding limit

To limit and allocate efficiently the loss of Federal tax revenue associated with the special tax treatment afforded qualified plans, ERISA and the Code limit the amount of annual contributions that can be made to a defined benefit plan.

One limitation is the full funding limit, under which no contribution is required under the minimum funding rules to the extent the plan is at the full funding limit. Before 1988, the full funding limit was 100 percent of an employer's accrued liability, as determined under the plan's funding method. However, because of concerns that employers could manipulate the limit by changing actuarial assumptions, the Pension Protection Act of 1987 amended ERISA and the Code to create a new full funding limit. The new full funding limit is equal to the lesser of the old funding limit (accrued liability) or 150 percent of the employer's current liability. Current liability is all liabilities to participants and beneficiaries under the plan determined as if the plan terminated. It represents only benefits accrued to date, and is not dependent on the actuarial funding method. As a result, the new full funding limit can be lower than the old full funding limit.

If the employer contributes an amount equal to the full funding limit, the funding standard account is credited so that the employer is not subject to the underfunding excise tax, even though the funding standard account would otherwise be left with a deficit for the year. In addition, the full funding limit affects the deductibility of employer contributions to qualified plans.[20]

Time for making contributions

Under present law, the required minimum funding contribution for a plan year must be made within 8½ months after the end of the plan year. If the contribution is made by such due date, the contribution is treated as if it were made on the last day of the plan year. In the case of single-employer defined benefit pension plans, 4 installments of estimated contributions are required for the plan year with the total contribution due within 8½ months after the end of the plan year. The amount of each required installment is 25 percent of the lesser of (1) 90 percent of the amount required to be contributed for the current plan year or (2) 100 percent of the amount required to be contributed for the preceding plan year. If a plan sponsor fails to make a required installment, additional interest is charged to the funding standard account.

Explanation of provision

Special funding rules for underfunded plans

In general.—The bill changes the special funding rules for underfunded single-employer defined benefit plans (other than plans with no more than 100 participants on any day in the preceding plan year) that were adopted in the Pension Protection Act of 1987. In general, the bill (1) provides (a) a permanent rule that exempts from the special funding rules applicable to underfunded plans, plans that have a funded current liability percentage of at least 90 percent and certain plans that have a funded current liability percentage between 80 percent and 90 percent, and (b) transition rules under which certain other plans are exempt, (2) modifies the calculation of the minimum required contribution applicable to underfunded plans, (3) changes the permissible range of interest rates and requires uniform mortality assumptions for the purpose of determining a plan's current liability, (4) accelerates the funding of a plan's "unfunded new liability", (5) changes the calculation of the additional funding contribution required on account of an unpredictable contingent event, (6) provides an elective transition rule

[20] The effect of the full funding limit on the deductibility of employer contributions is described below.

for sponsors of underfunded plans to protect against possibly large increases in their minimum required contributions on account of the proposed changes in the special funding rules, and (7) changes the manner in which sponsors of defined benefit pension plans determine the full funding limit of their plans.

Certain underfunded plans exempt from the special funding rules—Permanent rules.—The bill provides two exceptions to the special funding rules for underfunded plans. First, such rules do not apply to a plan which for any plan year has a current funded liability percentage of at least 90 percent. This rule is referred to as the "90-percent exemption."

Second, the special funding rules for underfunded plans do not apply for a plan year if (1) the funded current liability percentage for the plan year is at least 80 percent and (2) the funded current liability percentage for each of the two immediately preceding plan years (or each of the second and third immediately preceding plan years) is at least 90 percent. This rule is referred to as the "volatility rule."

For purposes of these exemptions, the funded current liability percentage is determined using the highest interest rate in the permissible range and the mortality assumptions contained in the bill. In addition, assets are not reduced by credit balances in the funding standard account.

The following example illustrates the exceptions to the special funding rules for underfunded plans.

Example 1: Assume that the funded current liability percentage (determined as specified under the bill) for Plan A for each of the plan years beginning on January 1, 1996, 1997, 1998, and 1999 is as follows: 95%, 95%, 75%, and 80%. For plan years 1996 and 1997, the plan is not subject to the additional funding rules for underfunded plans because the funded current liability percentage is at least 90%. The plan is subject to the additional funding rules for plan year 1998 because the funded current liability percentage is below 80%. The plan is not subject to the additional funding rules for plan year 1999, because it satisfies the volatility rule.

Transition rules.—The bill provides two transition rules under which certain plans are exempt from the new rules for underfunded pension plans.

The first rule applies for purposes of determining whether a plan is subject to the new rules in plan years beginning in 1995 and 1996. A plan is not subject to the new rules for a plan year beginning in 1995 or 1996 if (1) in that year, the plan's funded current liability percentage is at least 80 percent, and (2) the plan meets a transition test in any two of the plan years beginning in 1992, 1993, and 1994. The transition test need not be satisfied by the same method in each year. The transition test is met for a plan year if, for the plan year, the plan met one of the following requirements (under the law as then in effect):

(1) the plan did not have an additional charge under the special funding rules for underfunded plans (or would not have had such a charge if the plan used the highest interest rate

within the permissible range[21] and assets are determined by taking into account credit balances in the funding standard account):

(2) the plan's full funding limit was zero; or

(3) the amount required to be contributed under the special rules for underfunded plans (i.e., the amount of the deficit reduction contribution) did not exceed the lesser of .5 percent of current liability or $5 million.

The second rule applies for purposes of determining whether a plan is subject to the new rules for plan years beginning in 1996 and 1997.[22] A plan is not subject to the new rules for a plan year beginning in 1996 or 1997 if (1) in that year, the plan's funded current liability percentage is at least 80 percent, (2) the plan's current liability percentage for the plan year beginning in 1995 was at least 90 percent, and (3) in the plan year beginning in 1994, the plan met one of the three transition requirements described above.

Calculation of minimum required contribution

The bill changes the manner in which underfunded plans calculate their minimum required contribution for a plan year. Under the bill, amounts necessary to amortize experience gains and losses and gains and losses resulting from changes of actuarial assumptions are no longer considered in the calculation of the minimum required contribution for underfunded plans. According to the PBGC, one reason that the minimum required contribution for underfunded plans adopted in the Pension Protection Act of 1987 has not been effective in increasing contributions to underfunded plans is because experience gains or gains from changes in actuarial assumptions are counted twice under present law, i.e., to reduce the minimum required contribution for underfunded plans and as a credit to the funding standard account under the normal funding rules. Thus, under the bill, the minimum required contribution for underfunded plans is, in general, the greater of (1) the amount determined under the normal funding rules, or (2) the deficit reduction contribution plus the amount required with respect to benefits that are contingent on unpredictable events.

Further, the bill adds a third and fourth component to the calculation of the deficit reduction contribution under present law. Under the bill, the deficit reduction contribution is the sum of (1) the unfunded old liability amount, (2) the unfunded new liability amount, (3) the expected increase in current liability due to benefits accruing during the plan year, and (4) the amount needed to amortize the increase in current liability due to certain future changes in the required mortality tables. The third component replaces the normal cost component of the calculation under present law. The fourth component is discussed below.

In addition, the bill provides that the amount of the minimum required contribution for underfunded plans cannot exceed the amount necessary to increase the funded current liability percent-

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[21] For plan years beginning in 1992, 1993, and 1994, the highest rate within the permissible range is 110 percent of the 4-year weighted average of the rates on 30-year Treasury securities.

[22] For plan years beginning in 1996, a plan may satisfy either the first or the second transition rule. For plan years beginning in 1997, a plan may satisfy either the second transition rule or the permanent rule.

age of the plan to 100 percent taking into account all charges and credits to the funding standard account and the expected increase in current liability attributable to benefits accruing during the plan year.

Changes in interest rates and mortality assumptions

In general.—As under present law, the calculation of the deficit reduction contribution for underfunded plans is based on the plan's current liabilities. Under the bill, a plan's current liability is determined as under present law, except that the bill (1) lowers the maximum interest rate that can be used to determine the current liability, and (2) requires all underfunded plans to use the same mortality table to determine current liability.

Interest rate.—For plan years beginning on or after January 1, 1999, the bill reduces the highest permissible rate that may be used to calculate current liability to 105 percent of the weighted average of the rates of interest on 30-year Treasury securities during the 4-year period ending on the last day before the beginning of the plan year. For years beginning after 1994 and before 1999, the maximum permitted interest rate is the following percentage of such 4-year weighted average rate: plan years beginning in 1995, 109 percent; plan years beginning in 1996, 108 percent; plan years beginning in 1997, 107 percent; and plan years beginning in 1998, 106 percent.

Mortality tables.—Under the bill, in the case of plan years beginning after December 31, 1994, the mortality table used to determine current liability is to be prescribed by the Secretary based upon the 1983 Group Annuity Mortality Table (GAM 83 mortality table). Such mortality table will be effective until the later of plan years beginning in 2000 or such time as the Secretary prescribes new tables by regulations. Any tables prescribed by the Secretary are to reflect the actual experience of pension plans and projected trends in such experience. In prescribing tables, the Secretary is to take into account the results of independent studies on mortality of individuals covered by pension plans. The Secretary is required to review the new tables at least every five years and update them as necessary to reflect changes in pension plan experience and trends. Increases in liability due to changes in mortality assumptions in the first year in which new mortality tables are effective are to be amortized over 10 years in equal installments.

Plans are permitted to use a different mortality table for certain participants who are entitled to benefits on account of disability ("disabled participants"). For plan years beginning in 1995, plans may use their own mortality assumptions for disabled participants (under the plan's definition of disability) provided such assumptions meet the general requirement that actuarial assumptions be reasonable. For plan years beginning on or after January 1, 1996, the Secretary is to prescribe mortality tables for disabled participants. The Secretary is to prescribe two tables: one table for persons who become entitled to disability benefits (under the plan's definition of disability) before the plan year beginning in 1995; and another table for persons who become eligible for disability benefits in a plan year beginning on or after January 1, 1995. The separate disability table may not be used with respect to persons who become entitled to disability benefits under the plan on or after January 1, 1995, unless such persons are disabled within the meaning of Title II of the Social Security Act.

Amortization of increases in current liability under the bill.—Under the bill, increases in current liability attributable to the bill's changes in interest rates and mortality assumptions for the 1995 plan year are treated as an "additional unfunded old liability amount" and are amortized in equal annual installments over 12 years beginning with the 1995 plan year. The additional unfunded old liability amount is the difference between the current liability of the plan as of the beginning of the 1995 plan year using (1) the interest and mortality assumptions contained in the bill and (2) the mortality assumption and relative interest rate used to determine current liability for the 1993 plan year. For example, if the plan used 110 percent of the weighted average in the 1993 plan year, the relative interest rate for this calculation would be 110 percent of the weighted average in the 1995 plan year.

As an alternative to amortization of only the change in current liability due to changes in interest and mortality assumptions, an employer may make an irrevocable election to expand the 12-year amortization to the entire increase in current liability attributable to plan years beginning after December 31, 1987 and before January 1, 1995.

The increase in liability for this optional rule would be measured as the amount by which the plan's unfunded current liability as of the beginning of the 1995 plan year, valued using the new specified interest and mortality assumptions, exceeds the unamortized portion of the unfunded old liability under the plan as of the beginning of the 1995 plan year. This increase would be treated as unfunded old liability and amortized over 12 years beginning with the first plan year beginning on or after January 1, 1995. If an election is made to amortize this amount and the plan would otherwise be subject to the special rules for underfunded plans, the amount charged to the funding standard account under section 302(d) of ERISA and section 412(1) of the Code for plan years beginning after December 31, 1994 and before January 1, 2002, would not be less, for any year, than the amount that would have been required under those sections if current law had remained in effect.

Acceleration of unfunded new liability

Under present law, if a plan's funded current liability percentage is 35 percent or less, 30 percent of the plan's unfunded new liability for the plan year must be included in the calculation of the deficit reduction contribution for the plan year. The bill increases the 35 percent threshold under present law to 60 percent. Thus, under the bill, if a plan's funded current liability percentage is 60 percent or less, 30 percent of the plan's unfunded new liability for the plan year would be included in the calculation of the deficit reduction contribution for the plan year. Under the bill, the 30 percent amount decreases by .40 of one percentage point for each percentage point by which the plan's funded current liability percentage exceeds 60 percent, to a minimum of 18 percent for a plan that is 90-percent funded.

Unpredictable contingent event benefits

The bill adds a third component to the calculation of the additional funding contribution required on account of an unpredictable contingent event. Under the bill, the amount of the additional funding contribution is equal to the greater of the amounts determined under present law or the additional contribution that would be required if the unpredictable contingent event benefit liabilities were included in the calculation of the plan's unfunded new liability for the plan year. Under present law, for purposes of calculating the unfunded new liability for a plan year, all unpredictable contingent event benefits are disregarded.

In addition, the bill limits the present value of the additional funding contribution with respect to one event to the unpredictable contingent event benefit liabilities attributable to that event.

Transition rule

The bill provides an elective transition rule for sponsors of underfunded plans to protect against possibly large increases in their minimum required contributions on account of changes in the special funding rules. Under the transition rule, the minimum required contribution for a plan year cannot be less than the minimum required contribution determined under present law.

Relief under the transition rule depends on the plan's funded current liability percentage. This relief is based upon the amount necessary to increase the plan's funded current liability percentage by a specified percentage by the end of the plan year, including the expected increase in current liability due to benefits accruing and the expected benefit payments during the plan year. The specified percentages and the initial funded current liability percentage are not adjusted to reflect the changes in the maximum permitted interest rate scheduled for plan years beginning before January 1, 2000.

Changes in full funding limit

The bill changes the manner in which sponsors of defined benefit pension plans determine the full funding limit to conform to IRS practice. The bill retains the present-law rules relating to the determinition of a defined benefit pension plan's full funding limit but also provides that the expected increase in current liability due to benefits accruing during the plan year be included when determining the employer's current liability. The bill allows plans to determine their 150 percent of current liability limit for full funding limit purposes without regard to the modifications of the interest rate and mortality assumptions set forth in the bill.

The bill also provides that the full funding limit is not less than 90 percent of the plan's current liability (using the modifications to the interest rate and mortality assumptions set forth in the bill). In determining whether a plan is at this 90 percent limit, plan assets are not reduced by credit balances in the funding standard account.

It is intended that reporting requirements will be revised as necessary to implement the revised funding rules, for example, to reflect the volatility rules, the liquidity requirement (discussed below), the revised full funding limitation, and the transition rules.

Plan liquidity requirement.—In general, the bill requires underfunded single-employer defined benefit pension plans to make quarterly contributions sufficient to maintain liquid plan assets, i.e., cash and marketable securities, at an amount approximately equal to three times the total trust disbursements for the preceding 12-month period.

Under the bill, the plan liquidity requirement applies to underfunded single-employer defined benefit pension plans (other than small plans)[23] that (1) are required to make quarterly installments of their estimated minimum funding contribution for the plan year, and (2) have a liquidity shortfall for any quarter during the plan year. A plan has a liquidity shortfall if its liquid assets as of the last day of the quarter are less than the base amount for the quarter. Liquid assets are cash, marketable securities and such other assets as specified by the Secretary of the Treasury. The base amount for the quarter is an amount equal to the product of three times the adjusted disbursements from the plan for the 12 months ending on the last day of the last month preceding the quarterly installment due date. If the base amount exceeds the product of two times the sum of adjusted disbursements for the 36 months ending on the last day of the last month preceding the quarterly installment due date, and an enrolled actuary certifies to the satisfaction of the Secretary of the Treasury that the excess is the result of nonrecurring circumstances, such nonrecurring circumstances are not included in the base amount. For purposes of determining the base amount, adjusted disbursements mean the amount of all disbursements from the plan's trust, including purchases of annuities, payments of single sums, other benefit payments, and administrative expenses reduced by the product of the plan's funded current liability percentage for the plan year and the sum of the purchases of annuities, payments of single sums, and such other disbursements as the Secretary of the Treasury provides in regulations.

Under the bill, the amount of the requirement quarterly installment for defined benefit pensions plans that have a liquidity shortfall for any quarter is the greater of the quarterly installment as determined under present law or the liquidity shortfall. The amount of the liquidity shortfall must be paid in the form of liquid assets. It may not be paid by the application of credit balances in the funding standard account. The amount of any liquidity shortfall payment when added to prior installments for the plan year cannot exceed the amount necessary to increase the funded current liability percentage of the plan to 100 percent taking into account the expected increase in current liability due to benefits accruing during the plan year.

If a liquidity shortfall payment is not made, then the plan sponsor will be subject to a nondeductible excise tax equal to 10 percent of the amount of the outstanding liquidity shortfall. A liquidity shortfall payment will no longer be considered outstanding on the earlier of (1) the last day of a later quarter for which the plan does not have a liquidity shortfall or (2) the date on which the liquidity

[23] A plan is a small plan if it had 100 or fewer participants on each day during the plan year (as determined in Code sec. 412(l)(6)).

shortfall for a later quarter is timely paid. If the liquidity shortfall remains outstanding after four quarters, the excise tax increases to 100 percent.

The bill amends ERISA to prohibit fiduciaries from making certain payments from defined benefit pension plans during the period in which the plan has a liquidity shortfall. Prohibited payments include (1) plan distributions in excess of the monthly amount paid under a single life annuity (plus any social security supplements) to plan participants or beneficiaries whose annuity starting date (as defined under present law)[24] occurs during the period in which there is a liquidity shortfall, (2) purchases of benefit annuities from insurers, or (3) other payments as provided by the Secretary of the Treasury. The bill also amends ERISA to include a civil penalty for violations of the prohibited payment rule. Under the bill, if a fiduciary makes a prohibited distribution from the plan, he or she will be subject to a civil penalty for each prohibited distribution equal to the lesser of the amount of the distribution of $10,000. Finally, the bill amends the Code to provide that compliance with ERISA's prohibited payment rules will not result in plan disqualification for tax purposes.

Effective date

The provision generally applies to plan years beginning after December 31, 1994.

2. ERISA citations (sec. 751(a)(11) of the bill and sec. 404(g)(4) of the Code)

Present law

Under present law, contributions to tax-qualified pension plans are deductible within limits. The Code provides that amounts paid by an employer or a member of its controlled group under the following provisions of ERISA are treated as plan contributions subject to the deduction rules of the Code (Code sec. 404(g)(1)): (1) section 4041(b) of ERISA (relating to standard terminations); (2) section 4062 of ERISA (relating to liability to the PBGC in the case of a distress termination); (3) section 4063 of ERISA (relating to liability of a substantial employer for withdrawal from single-employer plans under multiple controlled groups); (4) section 4064 of ERISA (relating to liability on termination of single-employer plans under multiple controlled groups; and (5) part I of subtitle E of title IV of ERISA (relating to liability upon withdrawal from a multiemployer plan). The Code provides that the references to these sections of ERISA are to these sections as in effect on the date of enactment of the Single Employer Pension Plan Amendments Act of 1986 (SEPPAA). The amounts referred to in such sections have generally been increased since the enactment of SEPPAA.

[24] Under present law, an individual's annuity starting date is the first day of the first period for which an amount is payable as an annuity or in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the individual to such benefit (sec. 417(f)(2) of the Code).

Explanation of provision

The bill provides that the references to ERISA in Code section 404(g) are to ERISA as in effect on the date of enactment of the bill.

Effective date

The provision is effective on the date of enactment.

3. Contributing sponsor (sec. 761(a)(11) of the bill and sec. 4001(a)(13) of ERISA)

Present law

Under present law, for purposes of the PBGC termination insurance program, the contributing sponsor of a plan is defined as a person (1) who is responsible, in connection with such plan, for meeting the funding requirements under section 302 of ERISA or under section 412 of the Code, or (2) who is a member of the controlled group of a person described in (1), has been responsible for meeting such funding requirements, and has employed a significant number (as may be defined by the PBGC) of participants under such plan while such person was so responsible. Under the Pension Protection Act of 1987, all members of a contributing sponsor's controlled group are responsible for the minimum funding requirements.

Explanation of provision

The bill defines contributing sponsor for purposes of title IV of ERISA to mean the person responsible for making minimum funding contributions to the plan under section 302 of ERISA or section 412 of the Code, without regard to the controlled group rules. All members of a contributing sponsor's controlled group remain liable for making the minimum funding contribution.

Effective date

The provision is effective as if included in the Pension Protection Act of 1987.

4. Limitation on changes in current liability assumptions (secs. 752 and 762 of the bill, sec. 412(c) of the Code, and sec. 302(c) of ERISA)

Present law

Under present law, in determining plan funding under an actuarial cost methods, a plan's actuary makes certain assumptions regarding the future experience of a plan. These assumptions typically involved rates of interest, mortality, disability, salary increases, and other factors affecting the value of assets and liabilities. A plan's actuary may revise these assumptions to reflect the actual experience of the plan. Actuarial assumptions must be reasonable both individually and in the aggregate and must reflect the actuary's best estimate of experience under the plan.

Explanation of provision

The bill prohibits certain underfunded plans from changing the actuarial assumptions used to determine current liability for a plan year (other than interest rate and mortality assumptions) unless the new assumptions are approved by Secretary of the Treasury. Under the bill, approval of changes in actuarial assumptions applies to a single-employer defined benefit pension plan if: (1) the plan is subject to the termination insurance program under Title IV of ERISA; (2) the aggregated unfunded vested benefits of all underfunded plans maintained by the employer and members of the employer's controlled group exceed $50 million; and (3) the change in assumptions decreases the plan's unfunded current liability for the current plan year by (a) more than $50 million or (b) more than $5 million and at least 5 percent of the current liability.

Effective date

The provision is effective with respect to changes in actuarial assumptions for plan years beginning after October 28, 1993. In addition, any changes in actuarial assumptions for plan years beginning after December 31, 1992, and before October 29, 1993, that would have been subject to the approval requirements set forth in the bill will not be effective for plan years beginning after 1994 unless approved by the Secretary of the Treasury.

5. Anticipation of bargained benefit increases (secs. 753 and 763 of the bill, sec. 412(c) of the Code, and sec. 302 of ERISA)

Present law

Under final Treasury Regulations, a defined benefit plan's funding method is not considered reasonable if it anticipates changes in plan benefits that become effective, whether or not retroactively, in a future plan year or that become effective after the first day of, but during, a current plan year. However, the regulations contain an elective exception to this general rule for collectively bargained plans. Under the regulations, a collectively bargained plan's funding method is considered reasonable if the plan elects on a consistent basis to anticipate benefit increases scheduled to take effect during the term of the collective bargaining agreement applicable to the plan (Treas. Reg. 1.412(c)(3)–1(d).

Explanation of provision

The bill requires sponsors of collectively bargained plans to recognize any negotiated benefit increases scheduled to take effect in a future plan year in the plan year in which the collective bargaining agreement is entered into for purposes of the normal funding rules but not the special rules for underfunded plans.

Effective date

The provision applies to plan years beginning after December 31, 1994, with respect to collective bargaining agreements in effect on or after January 1, 1995.

6. *Modification of quarterly contribution requirement (secs. 754 and 764 of the bill, sec. 412(m) of the Code, and sec. 302(e) of ERISA)*

Present law

Under present law, the required minimum funding contribution for a plan year must be made within 8½ months after the end of the plan year. If the contribution is made by such due date, the contribution is treated as if it were made on the last day of the plan year. In the case of single-employer defined benefit pension plans, 4 installments of estimated contributions are required for the plan year with the total contribution due within 8½ months after the end of the plan year. The amount of each required installment is 25 percent of the lesser of (1) 90 percent of the amount required to be contributed for the current plan year or (2) 100 percent of the amount required to be contributed for the preceding plan year. If a plan sponsor fails to make a required installment, additional interest is charged to the funding standard account.

Explanation of provision

Under the bill, single-employer defined benefit plans with at least a 100-percent funded current liability percentage in the preceding plan year are not required to make quarterly estimated contributions during the current plan year.

Effective date

The provision is effective for plan years beginning after the date of enactment.

7. *Exceptions to excise tax on nondeductible contributions (sec. 755 of the bill and new sec. 4972(c)(6) of the Code)*

Present law

The Code imposes a limit on the amount of deductible contributions that can be made annually to a defined benefit pension plan. Contributions necessary to pay normal costs (as defined under the funding rules) generally are fully deductible. Contributions necessary to fund supplemental costs generally are deductible only to the extent necessary to cover such costs amortized over 10 years. However, the amount of the deduction an employer can claim for the year cannot exceed the full funding limitation for that year, except that a special deduction rule applies to underfunded defined benefit pensions plans. In the case of a single-employer defined benefit pension plan which has more than 100 participants during the plan year, the maximum amount deductible is not less than the plan's unfunded current liability as determined under the minimum funding rules. For purposes of determining whether a plan has more than 100 participants during a plan year, all defined benefit pension plans maintained by the same employer or any member of the employer's controlled group (within the meaning of secs. 414(b), (c), (m), and (o) of the Code) are treated as one plan but only employees of such member or employer are taken into account.

The Code also imposes limits on the amount of deductible contributions that can be made annually if an employer sponsors both a defined benefit pension plan and a defined contribution plan that covers some of the same employees. Under the combined plan deduction limits, the total deduction for all plans for a plan year is generally limited to the greater of (1) 25 percent of compensation or (2) the contribution necessary to meet the minimum funding requirements of the defined benefit pension plan for the year. For underfunded single-employer defined benefit pension plans with more than 100 participants for the plan year, the maximum deductible contribution for the year is not less than the plan's unfunded current liability as determined under the minimum funding rules.

There is a 10-percent nondeductible excise tax imposed on contributions in excess of the applicable deduction limit (Code sec. 4972).

Explanation of provision

Under the bill, nondeductible contributions to a terminating single-employer defined benefit pension plan subject to Title IV of ERISA with less than 101 participants for the year are not subject to the excise tax on nondeductible contributions to the extent such nondeductible contributions do not exceed the plan's unfunded current liability as determined under the minimum funding rules.

In addition, employer contributions to one or more defined contribution plans that are nondeductible because they exceed the combined plan deduction limits are not subject to the 10-percent nondeductible excise tax to the extent such contributions do not exceed 6 percent of compensation in the year for which the contributions are made. The 6-percent of compensation limit is determined on an aggregate basis. For example, if an employer makes contributions to two defined contribution plans under the rule, the excise tax does not apply as long as the contributions are less than 6 percent of the aggregate compensation of participants in both plans. For purposes of this rule, the combined plan deduction limits are first applied to contributions to the defined benefit pension plan. If contributions exceed the 6-percent limit, only those in excess of 6 percent are subject to the excise tax. This provision applies only if the defined benefit pension plan is a single-employer defined benefit pension plan that has more than 100 participants. Amounts that are not subject to the excise tax in the year contributed shall not be taken into account for purposes of applying the 6-percent limit in any future year.

Effective date

The provision waiving the excise tax for nondeductible contributions to a terminating single-employer defined benefit pension plan is effective for taxable years ending on or after the date of enactment. The provision waiving the excise tax for nondeductible contributions to certain defined contribution plans is effective for taxable years ending on or after December 31, 1992.

8. Prohibition on benefit increases where plan sponsor is in bankruptcy (sec. 766 of the bill, sec. 401(a) of the Code, and sec. 204 of ERISA)

Present law

Under present law, there is no restriction on the adoption of plan amendments that increase benefits when a plan is underfunded.

Explanation of provision

The bill amends the Code and ERISA to prohibit an employer in bankruptcy from adopting an amendment to an underfunded plan that increases benefits unless the benefit increase does not become effective until after the effective date of the employer's plan of reorganization. The prohibition does not apply to amendments that (1) provide reasonable, de minimis increases in liabilities for employees of the debtor, (2) repeal an amendment made within the first 2½ months of plan year that would reduce accruals for that plan year, as permitted under section 302(c)(8) of ERISA, or (3) are needed to meet the qualification requirements contained in the Code.

Effective date

The provision is effective with respect to plan amendments adopted on or after the date of enactment.

9. Single sum distributions (sec. 767 of the bill, secs. 411(a)(11), 417(e), and 415(b) of the Code, and secs. 203(e) and 205(g) of ERISA)

a. Determination of present value

Present law

Under the Code and ERISA, if the present value of a participant's nonforfeitable accrued benefit exceeds $3,500, the benefit cannot be distributed (i.e., cashed out) without the consent of the participant. In addition, if the present value of a joint and survivor annuity exceeds $3,500 it cannot be distributed without the consent of the participant and the participant's spouse. For purposes of these rules, present value is calculated by using an interest rate no greater than (1) the rate that would be used (as of the date of the distribution) by the PBGC for purposes of determining the present value of a lump-sum distribution on plan termination if the vested accrued benefit (using such rate) is not in excess of $25,000, or (2) 120 percent of such PBGC rate if the vested accrued benefit exceeds $25,000.

Explanation of provision

Under the bill, present value for purposes of the cash-out rules must be no less than the present value determined by using the mortality table that is to be prescribed by the Secretary of the Treasury based upon the "prevailing commissioners' standard table" used to determine reserves for group annuity contracts issued on the date as of which present value is determined. The prevailing commissioners' standard table means, with respect to any contract, the most recent commissioners' standard tables prescribed by the National Association of Insurance Commissioners which are permitted to be used in computing reserves for that type of contract under the insurance laws of at least 26 States when the contract was issued (sec. 807(d)(5)(A) of the Code). Currently, the prevailing commissioners' standard table used to determine reserves for annuity contracts is the GAM 83 mortality table. Future changes in the prevailing table will only apply to the calculation of present value when the Secretary of the Treasury issues guidance making such changes applicable.

In addition, present value for purposes of the cash-out rules must be no less than the present value determined by using the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such earlier time as provided in Treasury regulations. The annual rate of interest on 30-year Treasury securities is the rate published by the Board of Governors of the Federal Reserve System.

A plan will not violate the prohibition on the reduction of accrued benefits merely because it calculates benefits in accordance with the provision.

Effective date

The provision is generally effective for plan years beginning after December 31, 1994, except that an employer can elect to treat the provision as being effective on or after the date of enactment.

Under a transition rule for distributions from plans in effect on the date of enactment of the bill, until the earlier of the first plan year beginning after 1999 or the later of when a plan amendment applying the provision is adopted or made effective, the bill requires present value to be calculated as under present law, using the interest rate valuation methodology for lump-sum distributions under PBGC regulations in effect on September 1, 1993, the present-law Code and ERISA rules, and the current plan provisions (provided they are consistent with present law).

b. Limitation on maximum benefits

Present law

The Code provides limits on contributions and benefits under tax-qualified pension plans. In the case of a defined benefit pension plan, the maximum annual benefit payable is generally the lesser of (1) 100 percent of average compensation or (2) $118,800 for 1994. The dollar limit is adjusted annually for cost-of-living increases.

If the benefit under the plan is payable in a form other than a single life annuity, then the benefit must generally be converted to the actuarial equivalent of a single life annuity for purposes of applying the limit on benefits. If the benefit is payable before social security retirement age, the dollar limit on annual benefits is reduced so that the limit is actuarially equivalent to a benefit beginning at the social security retirement age. These adjustments are made using an assumed interest rate that is not less than the greater of 5 percent or the rate specified in the plan. Similarly, if the benefit is payable after social security retirement age, then the limit is actuarially increased. This adjustment is made using an assumed interest rate that is not greater than the lesser of 5 percent or the rate specified in the plan.

Explanation of provision

The bill provides that the mortality table required to be used for purposes of adjusting any benefit or limitation in applying the limit on maximum benefits is to be prescribed by the Secretary of the Treasury based upon the "prevailing commissioners' standard table" used to determine reserves for group annuity contracts issued on the date as of which the adjustments described in this provision are made. The prevailing commissioners' standard table means, with respect to any contract, the most recent commissioners' standard tables prescribed by the National Association of Insurance Commissioners which are permitted to be used in computing reserves for that type of contract under the insurance laws of at least 26 States when the contract was issued (sec. 807(d)(5)(A) of the Code). Currently, the prevailing commissioners' standard table used to determine reserves for annuity contracts is the GAM 83 mortality table. Future changes in the prevailing table will only apply to the adjustments described in this provision when the Secretary of the Treasury issues guidance making such changes applicable. In addition, in adjusting benefits that are payable in a form other than a single life annuity, if the benefit is subject to the joint and survivor annuity rules, the interest rate is the same interest rate used to calculate benefits under those rules (as described above).

A plan will not violate the prohibition on reduction in accrued benefits merely because it calculates benefits in accordance with the provision.

Effective date

The provision is effective for limitation years beginning after December 31, 1994, except that an employer can elect to treat the provision as being effective on or after the date of enactment. Benefits accrued as of the last day of the last plan year beginning before January 1, 1995, will not have to be reduced merely because of the provision. A plan does not have to be amended to comply with the provision until a date to be specified by the Secretary of the Treasury, provided the plan complies with the proposal in operation.

10. Adjustments to lien for missed minimum funding contributions (sec. 768 of the bill, sec. 412(n) of the Code, and sec. 302(f) of ERISA)

Present law

Under present law, in the case of a single-employer defined benefit pension plan with a funded current liability percentage of less than 100 percent, a lien arises on all controlled group property in favor of the plan 60 days after the due date of an unpaid required contribution where the cumulative missed contributions exceed $1 million. The amount of the lien is the amount of the cumulative missed contributions in excess of $1 million.

Explanation of provision

The bill (1) eliminates the 60-day waiting period before the lien arises, (2) eliminates the $1 million exclusion on amounts subject to the lien, and (3) provides that the lien applies only to plans covered by the PBGC termination insurance program. Thus, for example, the lien provision does not apply to plans maintained by a professional services employer which do not have more than 25 active participants or to plans maintained exclusively for substantial owners.[25]

Effective date

The provision is effective for required contributions that become due on or after the date of enactment.

11. Special funding rule for certain plans (sec. 769 of the bill)

Present law

Under certain circumstances, the PBGC may restore the operation of a plan that has terminated to the sponsor of the plan. Treasury regulations set forth rules regarding the funding of plans that have been terminated and then restored by the PBGC.

Explanation of provision

The bill provides that any changes made by the bill to the funding rules of the Code or ERISA do not apply to certain plans. In particular, such changes do not apply to a plan that, on the date of enactment, is subject to a restoration payment schedule order issued by the PBGC and that meets the requirements of Treasury regulations.

Such changes do not apply to a plan maintained by an affected air carrier (as defined in section 4001(a) of ERISA) and assumed by a new plan sponsor pursuant to the terms of a written agreement with the PBGC dated January 5, 1993, and approved by the U.S. Bankruptcy Court on December 30, 1992.

The bill also provides that for the first 5 plan years beginning after December 31, 1994, certain amortization amounts are not taken into account in the calculation of offsets under section 412(l)(1)(A)(ii) of the Code (and the corresponding section of ERISA). The amortization amounts that are not taken into account are those established for plan years beginning after December 31, 1987, and before January 1, 1993, by reason of nonelective changes under the frozen entry age actuarial cost method.[26] An example of a nonelective change is a change in the method to redetermine the unfunded liability so as to prevent the calculation of a normal cost under the method that was negative.[27]

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[25] Substantial owner is defined generally as an individual who (1) owns the entire interest in an unincorporated trade or business, (2) in the case of a partnership, is a partner who owns more than 10 percent of the capital or profits interests in the partnership, or (3) in the case of a corporation, owns more than 10 percent in value of the voting stock of the corporation or all the stock of the corporation.

[26] This method is also known as the frozen initial liability method.

[27] Under this funding method, the normal cost is generally determined by dividing (1) the actuarial present value of future benefits less the sum of the actuarial value of the assets and the unfunded liability by (2) a weighted temporary annuity factor that spreads the cost of the plan over future years. If the sum of the actuarial value of assets and the unfunded liability exceed the present value of future benefits, the normal cost under the method will be negative.

Effective date

The provision is effective on the date of enactment.

B. PART II.—AMENDMENTS RELATING TO TITLE IV OF ERISA

1. Reportable events (sec. 771 of the bill and sec. 4043 of ERISA)

Present law

Under present law, the plan administrator is required to notify the PBGC of the occurrence of certain events, called reportable events, that may indicate possible risk to the financial status of the plan or the PBGC insurance program. The plan administrator is to notify the PBGC within 30 days after the plan administrator knows or has reason to know that a reportable event has occurred. If an employer making contributions under a plan knows or has reason to know that a reportable event has occurred, the employer is to notify the plan administrator of the reportable event.

Explanation of provision

The bill provides that a contributing sponsor that knows or has reason to know that a reportable event has occurred (as well as the plan administrator) is responsible for reporting the event to the PBGC, and repeals the requirement that an employer notify the plan administrator of reportable events.

The bill adds a number of new events to the list of reportable events. Under the bill, a reportable event occurs: (1) when a person ceases to be a member of the controlled group; (2) when a contributing sponsor or a member of a contributing sponsor's controlled group liquidates in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision of a State; (3) when a contributing sponsor or a member of a contributing sponsor's controlled group declares an extraordinary dividend or redeems, in any 12-month period, an aggregate of 10 percent or more of the total combined voting power of all classes of stock entitled to vote, or an aggregate of 10 percent or more of the total value of shares of all classes of stock, of a contributing sponsor and all members of its controlled group; (4) when, in any 12-month period, an aggregate of 3 percent or more of the benefit liabilities of a plan covered by the PBGC insurance program are transferred to a person that is not a member of the contributing sponsor's controlled group or to a plan maintained by a person that is not a member of the contributing sponsor's controlled group.

A contributing sponsor is required to notify the PBGC of the occurrence of one of the new reportable events at least 30 days in advance of the effective date of the event if (1) as of the close of the preceding plan year, aggregate unfunded vested benefits of plans maintained by the contributing sponsor (or controlled group members) exceed $50 million, and (2) the funded vested benefit percentage of the plans is less than 90 percent.[28] This advance notice requirement does not apply to an event if the contributing sponsor or the member of the contributing sponsor's controlled group to which the event relates is a person subject to the reporting require-

[28] For these purposes, plans with no unfunded vested benefits and plans not subject to title IV or ERISA are disregarded.

ments of section 13 or section 15(d) of the Securities Exchange Act of 1934 or is a subsidiary (as defined for purposes of such Act) of a person subject to such reporting requirements.

Any information provided to the PBGC with respect to a reportable event generally is exempt from public disclosure.

Effective date

The provision is effective for events occurring 60 days or more after the date of enactment.

2. Certain information required to be furnished to the PBGC (sec. 772 of the bill and new sec. 4010 of ERISA)

Present law

The PBGC receives certain financial information from plans pursuant to required filings with the Department of Labor and other Governmental agencies.

Explanation of provision

The bill authorizes the PBGC to require certain contributing sponsors and controlled group members to submit to the PBGC such information as the PBGC may specify by regulation. The required information may include information that the PBGC determines is necessary to determine plan assets and liabilities and copies of audited financial statements. A contributing sponsor or controlled group member is subject to these information requirements if: (1) the total unfunded vested benefits of all underfunded plans sponsored by the controlled group exceed $50 million; (20 missed funding contributions exceed $1 million and the conditions for imposing a lien for missed contributions have been met; or (3) there are outstanding minimum funding waivers in an amount exceeding $1 million, any portion of which remains unpaid. Any information required to be provided to the PBGC under the provision would be exempt from public disclosure.

Effective date

The provision is effective on the date of enactment.

3. Enforcement of minimum funding requirements (sec. 773 of the bill and sec. 4003(e) of ERISA)

Present law

Under present law, the Secretary of the Treasury generally interprets and administers the minimum funding requirements. An excise tax applies with respect to the failure to satisfy the minimum funding requirements. In addition, plan participants and fiduciaries may bring suit under ERISA to enforce the minimum funding requirements. The Secretary of Labor may also bring suit to enforce the minimum funding requirements, if requested to do so by a plan participant, fiduciary, or the Secretary of the Treasury. The PBGC enforces a lien that arises in favor of the plan if missed required contributions exceed $1 million.

Explanation of provision

The bill gives the PBGC the authority to bring suit to enforce the minimum funding standards if the amount of missed required contributions exceeds $1 million. The bill does not change existing authority of the Department of the Treasury or the Department of Labor.

Effective date

The provision is effective for minimum funding contributions that become due on or after the date of enactment.

4. Phase out of variable rate premium cap (sec. 744 of the bill and sec. 4006(a) (3) of ERISA)

Present law

Single-employer defined benefit pension plans covered by the termination insurance program are required to pay a flat per-participant premium of $19. In addition, underfunded single-employer defined benefit pension plans are required to pay an additional premium based on the amount of underfunding for vested benefits. The additional premium is $9 per $1,000 of underfunding, and is capped at $53 per participant. Thus, the maximum per-participant premium for an underfunded plan is $72.

In determining the amount of underfunding for purposes of the additional premium, benefits are valued using an interest rate equal to 80 percent of the annual yield on 30-year Treasury securities for the month preceding the month in which the plan year begins. The value of plan assets is determined using the actuarial basis used for valuing assets for minimum funding purposes.

Explanation of provision

The bill phases out the cap on the additional premium for underfunded plans over three years, beginning with plan years beginning on or after July 1, 1994. For plan years beginning on or after July 1, 1994, but before July 1, 1995, the maximum additional premium is $53 per participant, plus 20 percent of the amount of the total premium (determined without regard to the cap) in excess of $53. For plan years beginning on or after July 1, 1995, but before July 1, 1996, the maximum additional premium is $53 per participant, plus 60 percent of the amount of the total premium (determined without regard to the cap) in excess of $53.

The bill also modifies the interest rate and asset valuation method to be used for purposes of determining the additional premium. For plan years beginning on and after July 1, 1997, the interest rate is 85 percent of the 30-year Treasury rate. For plan years beginning during or after the first year in which the successor mortality tables to GAM 83 as prescribed by the Secretary are first effective, the interest rate is 100 percent of the 30-year Treasury rate and assets are valued at market value.

Effective date

The provision is generally effective as described above. In the case of regulated public utilities engaged in providing electric energy, gas, water, or sewerage disposal services (as defined in Code sec. 7701 (a) (33) (A) (i)), no premiums in excess of those under present law are payable until the first plan year beginning on or after the earlier of January 1, 1998, or the date that the regulated utility begins to collect from customers rates that reflect the cost incurred for additional premiums pursuant to a final and nonappealable determination by all public utility commissions that the increased premium costs are recoverable from customers of the utility.

5. Disclosure to participants (sec. 775 of the bill and new sec. 4011 of ERISA)

Present Law

ERISA requires that plan participants be provided with certain information. One of these requirements is that, if the plan is less than 70 percent funded, the annual report regarding the plan must include the funded percentage of the plan. Plan administrators must also provided participants with a summary plan description (SPD) that advises participants of their rights, obligations, and eligibility for benefits under the plan. If the benefits are guaranteed by the PBGC, the SPD must include a summary of ERISA's guarantee provisions are a statement that more information may be obtained from the PBGC or the plan administrator. Department of Labor regulations include a safe harbor statement that can be included in the SPD to satisfy the requirements regarding the PBGC guarantee.

Explanation of provision

The bill amends title IV of ERISA to require that the plan administrator of a plan that must pay the additional premium applicable to underfunded plans must notify plan participants of the plan's funded status and the limits on the PBGC's guarantee should the plan terminate while underfunded, unless the plan is exempt from the special funding rules for underfunded plans (other than on account of the number of plan participants). For purposes of this exception to the disclosure requirement, a plan's funded currently liability percentage is determined without subtracting any credit balance in the plan's funding standard account from assets. The notice will have to be provided in the time and manner prescribed by the PBGC.

Effective date

The provision is effective for plan years beginning after the date of enactment.

6. Missing participants (sec. 776 of the bill and new sec. 4031 of ERISA)

Present law

Under present law, one of the requirements of a standard termination is that the plan administrator distribute plan assets by purchasing irrevocable commitments from an insurer in satisfaction of all benefit liabilities that must be in annuity form and by otherwise providing all benefit liabilities that need not be provided in annuity form. Under PBGC rules, if the plan administrator has been unable to locate participants after having made a reasonable effort to do so, the administrator must either purchase irrevocable commitments to provide benefits for each participant who has not been located or, in certain circumstances, deposit the amounts in a bank.

Explanation of provision

The bill provides special rules for payment of benefits in the case of participants under a plan terminating in a standard termination whom the plan administrator cannot locate after a diligent search ("missing participants"). The plan administrator is required to (1) transfer a participant's designated benefit to the PBGC or purchase an annuity from an insurer to satisfy the benefit liability to the participant, and (2) provide the PBGC with such information and certifications with respect to such benefits or annuity as the PBGC may specify. Any amounts transferred to the PBGC under the provision are treated as assets under a plan trusteed by the PBGC.

After a missing participant whose benefit was transferred to the PBGC is located, if the plan could have distributed the benefit to the participant in a single sum without participant or spousal consent, the PBGC will pay the participant a single sum benefit equal to the benefit paid to the PBGC, plus interest as specified by the PBGC. In order cases (i.e., if the plan could not have distributed the benefit in a single sum without consent), the PBGC will pay a benefit based on the designated benefit and the actuarial assumptions prescribed by the PBGC at the time that the PBGC received the designated benefit. The PBGC will make such payments available in the same forms and at the same times as a guaranteed benefit would be paid, except that the PBGC can make a benefit available in the form of a single sum if the plan provided such a benefit.

A designated benefit is the single sum benefit the participant would receive (1) under the plan's actuarial assumptions in the case of a distribution that can be made without participant or spousal consent, (2) under the PBGC assumptions in effect on the date that the designated benefit is transferred to the PBGC, in the case of a plan that does not pay any single sums other than those that can be made without consent, or (3) under the assumptions of the PBGC or the plan, whichever provides the higher single sum, in the case of a plan that does pay a single sum other than those that do not require consent.

The qualification requirements of the Code are amended to provide that a plan will not be treated as failing to satisfy those requirements merely because it provides for benefits to missing participants as provided in the bill.

Effective date

The provision is effective with respect to distributions that occur in plan years beginning after final regulations implementing the provision are adopted by the PBGC.

7. Modification of maximum guarantee for disability benefits (sec. 777 of the bill and sec. 4022(b) of ERISA)

Present law

The PBGC guarantee generally applies to a disability benefit if the benefit is in the form of an annuity payable because of permanent and total disability and the participant became disabled before the plan termination date. As is the case with other benefits, the PBGC guarantee is reduced if the benefit begins before age 65.

Explanation of provision

Disability benefits are exempted from the age reduction in the maximum PBGC insurance amount, if the participant has been determined to be entitled to social security benefits on account of disability.

Effective date

The provision is effective for terminations for which a notice of intent to terminate is filed or for which the PBGC institutes termination proceedings on or after the date of enactment.

8. Procedures of facilitate the distribution of termination benefits (sec. 778 of the bill and secs. 4041(b) and (c) of ERISA)

a. Remedies for noncompliance with requirements for standard terminations

President law

Under present law, a single-employer defined benefit pension plan can terminate in a standard termination only after the plan administrator notifies participants of the termination, issues individual benefit notices to participants, and files a notice with the PBGC that includes an enrolled actuary's certification of sufficiency. The PBGC has 60 days to review the proposed termination. If the PBGC does not issue a notice of noncompliance nullifying the proposed termination, the plan administrator may distribute plan assets.

If the plan administrator fails to give all participants advance notice of how their benefits were computed or fails to fully comply with other procedural requirements designed to protect participants, the PBGC generally is required to issue a notice of noncompliance and nullify the termination.

Explanation of provision

The bill provides that the PBGC is not required to issue a notice of noncompliance (and nullify a termination) in the case of failure to meet procedural requirements with respect to the termination if it determines that it would be inconsistent with the interests of participants and beneficiaries to issue the notice.

Effective date

The provision applies with respect to standard terminations for which the PBGC has not, as of the date of enactment, issued a notice of noncompliance that has become final, or otherwise issued a final determination that the plan termination is nullified.

b. Distress termination criteria for banking institutions

Present law

Under present law, a plan may terminate in a distress termination only if the contributing sponsor and each member of the controlled group of the contributing sponsor meet one of three financial distress standards. One of the standards of financial distress is that the entity is liquidating in bankruptcy or insolvency proceedings under title 11 of the United States Code or under any similar law of a State of political subdivision of a State.

Explanation of provision

The bill provides that a proceeding under title 11 of the United States Code or any similar Federal law qualifies as a standard for distress criteria. This standard applies, for example, to bank insolvency receivership actions.

Effective date

The provision is effective as if included in the SEPPAA. Thus, it is effective with respect to notices of intent to terminate filed with the PBGC on or after January 1, 1986.

MATTERS REQUIRED TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

VOTE OF THE COMMITTEE IN REPORTING THE BILL

In compliance with clause 2(l)(2)(B) of rule XI of the Rules of the House of Representatives, the following statement is made relative to the vote of the Committee in reporting the bill: H.R. 5110 was ordered favorably reported by the Committee, by a rollcall vote of 35 ayes, 3 noes, on September 28, 1994.

OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives relating to oversight findings, the Committee concludes, on the basis of extensive hearing testimony, numerous studies and reports on the potential impact of the Uruguay Round Agreements, correspondence from Members of Congress and the private sector, and from thorough review of the provisions of the agreements, that approval and implementation of the results of the Uruguay Round would be in the overall economic interest of the United States.

With respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings or recommendations have been submitted to the Committee by the Committee on Government Operations with respect to the subject matter contained in the bill.

BUDGETARY AUTHORITY AND COST ESTIMATES, INCLUDING ESTIMATES OF THE CONGRESSIONAL BUDGET OFFICE

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee states that there are no new tax expenditures or increases in existing tax expenditures created by the bill.

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee agrees with cost estimates furnished by the Congressional Budget Office (CBO) on H.R. 5110 and required to be included herein.

Although the Uruguay Round Agreements Act is estimated by CBO to increase the deficit (see CBO letter below), the Committee anticipates that the balances on the pay-as-you-go scorecard will be sufficient to offset the deficit increase when the Office of Management and Budget submits its official pay-as-you-go sequester report after the end of this session of Congress. Thus, the Committee anticipates that no pay-as-you-go sequester will result from the Uruguay Round Agreements Act.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 30, 1994.

Hon. SAM M. GIBBONS,
Acting Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5110, the Uruguay Round Agreements Act of 1994, as ordered reported by the Committee on Ways and Means on September 28, 1994. The Joint Committee on Taxation (JCT) and CBO estimate that the bill would decrease the deficit by $1,064 million in fiscal year 1995 and increase the deficit by $2,421 million over the 1995–1999 period as the result of changes in receipts and direct spending. The bill also would result in an additional spending subject to appropriations actions totaling $240 million over the 1995–1999 period. CBO estimates that enactment of this bill would not directly affect the budgets of state and local governments.

H.R. 5110 would approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations. These agreements would cut overall tariff rates by about one-third over ten years. The bill also includes several revenue and outlay provisions to offset the lost tariff revenue from agreements. CBO estimated the budgetary effects of the provisions that would affect tariffs and outlays, while JCT estimated the budgetary effects of other revenue provisions.

The additional spending subject to appropriations actions would result from increased administrative costs for the Social Security Administration and state unemployment insurance offices to implement voluntary withholding. The estimated budgetary effects of the bill as ordered reported by the Committee on Ways and Means are shown below.

BUDGET EFFECTS OF H.R. 5110

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999
Estimated revenues[1]	843	−1,372	−1,502	−2,824	−3,451
Direct Spending:					
Estimated budget authority	−221	−912	−1,374	−1,449	−1,929
Estimated outlays	−221	−912	−1,374	−1,449	−1,929
Spending subject to appropriations:					
Estimated authorizations of appropriations	60	45	45	45	45

BUDGET EFFECTS OF H.R. 5110—Continued

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999
Estimated outlays	60	45	45	45	45

[1] Positive changes refer to an increase in revenues; estimates are net of income and payroll tax offsets.

The Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting receipts or direct spending through 1998. Because H.R. 5110 would affect receipts and direct spending, pay-as-you-go procedures would apply to the bill. These effects are summarized in the table below.

ESTIMATED PAY-AS-YOU-GO IMPACT OF H.R. 5110

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998
Changes in outlays	−221	−912	−1,374	−1,449
Changes in receipts	843	−1,372	−1,502	−2,824

A detailed table of the receipt and direct spending effects of the bill is enclosed, along with a description of CBO's estimates for the direct spending provisions. If you wish further details, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

ESTIMATES OF CHANGES IN REVENUES AND DIRECT SPENDING ASSOCIATED WITH H.R. 5110, THE URUGUAY ROUND AGREEMENTS ACT OF 1994

[By fiscal years, in millions of dollars]

	1995	1996	1997	1998	1999	1995–99
Changes in Revenues (Net):						
Reduction in tariff rates and miscellaneous tariff provisions	−909	−1,657	−2,319	−2,973	−3,658	−11,516
Generalized System of Preferences extension (10/1/94–7/31/95)	−375	0	0	0	0	−375
Withholding on distribution of tribal casino profits [a]	15	11	14	15	16	71
Voluntary withholding on certain federal payments [a b]	0	0	183	18	20	221
Voluntary withholding on unemployment compensation [a b]	0	0	149	2	5	156
Treatment of subpart F and section 936 income [a]	999	153	76	79	84	1,391
Accelerate certain excise tax payments [a]	994	8	205	23	25	1,205
For Social Security benefits paid to nonresident aliens—withhold on 85 percent of payment rather than 50 percent [a]	41	61	64	67	70	303
Taxpayer identification numbers required at birth (revenue portion) [a]	0	8	9	9	9	35
Prohibit nonresident aliens from receiving earned income tax credit (EITC) and modify EITC for military personnel outside the United State (revenue portion) [a]	0	12	13	14	14	53
Treat partnership distributions of marketable securities like cash [a]	11	33	48	56	63	211
Extend Internal Revenue Service user fees for five years	0	31	31	31	31	124
Rounding rules for pension cost of living adjustments [a]	103	38	111	29	114	395

ESTIMATES OF CHANGES IN REVENUES AND DIRECT SPENDING ASSOCIATED WITH H.R. 5110, THE URUGUAY ROUND AGREEMENTS ACT OF 1994—Continued

[By fiscal years, in millions of dollars]

	1995	1996	1997	1998	1999	1995–99
Extend section 420 through 2000 with modifications [a]	0	42	120	119	118	399
Pension Benefit Guaranty Corporation (PBGC) reform (revenue portion) [a]	−1	−132	−226	−333	−382	−1,074
Substantial understatement penalty for corporate tax shelters [a]	15	20	20	20	20	95
Subtotal	843	−1,372	−1,502	−2,824	−3,451	−8,306
Changes in Outlays:						
Taxpayer identification numbers required at birth (outlay portion) [a]	0	−13	−16	−15	−15	−59
Prohibit nonresident aliens from receiving EITC and modify EITC for military personnel outside the United States (revenue portion) [a]	−2	−57	−62	−62	−62	−245
Deny EITC for income of prisoners (outlay portion) [a]	−2	−3	−3	−3	−3	−14
Interest rate for portion of corporate tax overpayments over $10,000 set at Federal short-term rate +0.5 percent	−17	−104	−174	−225	−280	−800
Savings bonds—repeal 4 percent minimum rate, allow market-based investment yields	−31	−25	−24	−24	−18	−122
Customs merchandise processing fee	−64	−87	−89	−89	−86	−415
PBGC reform (outlay portion)	−81	−333	−621	−496	−506	−2,037
Charge for licenses issued under pioneer preferences	−22	−27	−27	−27	−427	−530
Commodity Credit Corporation [c]	−2	−263	−358	−508	−532	−1,663
Subtotal	−221	−912	−1,374	−1,449	−1,929	−5,885
Effect on Deficit: Net Increase or Decrease (−)	−1,064	460	128	1,375	1,522	2,421

[a] Estimate provided by the Joint Committee on Taxation (JCT).
[b] These provisions would also increase federal government administrative costs.
[c] If the Crop Insurance Act of 1994 is cleared before the Uruguay Round Agreement Act, then this bill will be charged with additional outlays in 1995, depending upon the savings generated by the Crop Insurance Act.

BASIS OF CBO ESTIMATES OF DIRECT SPENDING EFFECTS OF H.R. 5110

REDUCE INTEREST RATE ON LARGE CORPORATE TAX REFUNDS (SEC. 713)

The bill would trim the interest rate paid on large refunds of taxes to corporations. Under current law, the rate of interest on refunds that qualify for interest is set at the federal short-term rate (a rate determined by the Secretary of the Treasury, basically resembling a Treasury bill rate) plus 2 percentage points. Section 713 would change this formula to the short-term rate plus 0.5 percentage point, for interest accruing after December 31, 1994. The change would apply only to corporate refunds larger than $10,000.

CBO estimated the savings by applying the one and a half percentage point reduction in rates to the projected amount of eligible refunds over the applicable period (generally, the period between the original payment or filing of tax and the certification of the refund minus a 45-day processing period). Initial savings would be small, but would mount as the post-1994 period represents a growing fraction of the interest-earning period for such refunds.

REPEAL 4 PERCENT MINIMUM RATE ON SAVINGS BONDS (SEC. 745)

The bill would repeal the 4 percent statutory minimum interest rate for U.S. savings bonds. The Treasury Department has publicly stated that it would then exercise its administrative discretion to—

Credit interest every six months, instead of monthly; and

Pay interest on bonds that are held for less than five years at a rate equal to 85 percent of the bond-equivalent rate on recent auctions of 6-month Treasury bills (a rate that would be updated semiannually).

The first change would save money—an estimated $135 million over five years—because someone redeeming a bond could forfeit up to six months of interest. (Under current rules, he or she can lose at most one month of interest.) The second change would have little impact—it would increase net interest spending by an estimated $13 million over five years—given CBO's January 1994 projections of interest rates.

The changes would take effect for bonds sold after enactment. CBO estimated savings by assuming—based on historical experience—that savings bond sales would total about $11 billion a year and that 30 percent of bonds would be held for less than five years, and would thereby earn less interest under this proposal. The bill would not affect bonds that are held for five years or more, which are projected to earn more than the 4 percent statutory minimum in any event. Therefore, such bonds are excluded from CBO's estimate.

RAISE CUSTOMS FEES

H.R. 5110 would raise fees that the United States Customs Service collects to process merchandise imported into the United States. Effective on January 1, 1995, the bill would raise the ad valorem rate on formal entries and releases from 0.19 percent to 0.21 percent and would raise certain other fees as well. CBO estimates that the additional fees collected would be $64 million in fiscal year 1995 and would total $415 million over the 1995–1999 period. These fees are recorded in the budget as offsetting receipts.

PBGC REFORM (OUTLAY PORTION)

Underfunded pension plans covered by the termination insurance program of the Pension Benefit Guaranty Corporation (PBGC) are required to pay PBGC a variable rate premium based on the amount of underfunding. The variable rate premium is $9 per $1,000 of underfunding and is currently capped at $53 per participant. This bill would phase out the cap on the variable rate premium over three years, starting with plan years beginning on or after July 1, 1994. This proposal also would require uniform mortality assumptions and would relax interest rate assumptions used when determining a plan's current liability for calculating its variable rate premium payments. The mortality assumptions that would be required are based on the 1983 Group Annuity Mortality Table (GAM–83). The interest rates would be changed from 80 percent to 85 percent of the 30-year Treasury rate, effective for plan years beginning on or after July 1, 1997.

CBO estimates that these amendments would increase the collection of premiums by about $81 million in 1995, and by a total of $2.0 billion over the 1995–1999 period. Premium collections are scored as reductions to direct spending outlays.

FEDERAL COMMUNICATIONS COMMISSION LICENSE FEES

Title VIII would require the Federal Communications Commission (FCC) to charge a fee to firms receiving a telecommunications license under the FCC's pioneer preference rules and would establish a formula for determining that fee. It would permit firms to pay the fee over five years. For broadband personal communications services (PCS), payments of interest only would be required for the first two years and payments for the last three years would be subject to the requirements of the FCC. If the statutory formula does not produce fees totaling at least $400 million for boradband PCS licenses, title VIII would require the FCC to collect that minimum amount. Based on the assumptions underlying the budget resolution baseline, CBO estimates that the fees calculated under the formula in title VIII would not produce $400 million from the broadband PCS pioneer firms, and that the FCC would charge them the minimum set in the bill. CBO expects that the FCC would charge the three firms interest only for the first four years, and then require a lump sum payment with interest in the fifth year. CBO estimates that the FCC would collect $22 million in 1995 and $530 million through 1999.

AGRICULTURAL TRADE

CBO estimates that the provisions of title IV would reduce direct spending budget authority and outlays by $2 million in 1995 and by almost $1.7 billion over the 1995–1999 period. Over $1 billion of the savings would come from reduced export subsidies in the Export Enhancement Program (EEP) based on the schedule of subsidy reductions required by the agreement. The agreement requires EEP subsidies to be cut by 36 percent in value and by 21 percent in volume by the sixth year from a historical base level. The remainder of the savings would come from effects on domestic commodity programs of changes in prices resulting from expected changes in import and export levels. CBO projects large savings in the rice and peanut programs relative to baseline spending levels.

Section 426 would provide additional funding for alternative export programs, with the amount of additional spending to be determined by the amount of savings generated by legislation to reform crop insurance. Because that legislation has not yet been enacted (it is currently in conference), this estimate does not include any additional spending related to section 426.

INFLATIONARY IMPACT

With respect to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee states that H.R. 5110 would not have an inflationary impact on prices and cost in the operation of the general economy. The overall reduction in tariffs under the

Uruguay Round agreements could reduce costs throughout the economy, and reduce pressures on prices of goods that have thus far been subject to these tariffs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In the opinion of the Committee, in order to expedite the business of the House of Representatives, it is necessary to dispense with the requirements of clause 3 of rule XIII of the Rules of the House of Representatives (relating to showing changes in existing law made by the bill as reported).

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